No. 22O134 ORG
Title: New Jersey, Plaintiff
v.
Delaware
Docketed: November 28, 2005

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 1 2005	**As of May 24, 2006 documents filed with the Special Master are available at www.pierceatwood.com**
Aug 1 2005	Motion to Reopen and for a Supplemental Decree, Petition, Brief and Appendix in Support of Motion filed by petitioner New Jersey, Plaintiff.
Aug 5 2005	Order extending time to file response to the plaintiff's motion to reopen and for a supplemental decree to and including September 12, 2005.
Aug 25 2005	Order extending time to file response to the plaintiff's motion to reopen and for a supplemental decree to and including October 27, 2005.
Oct 27 2005	Brief of respondent Delaware in opposition to the State of New Jersey's Motion to Reopen and for a Supplemental Decree filed.
Oct 28 2005	Lodging for brief of the State of Delaware in opposition to the State of New Jersey's motion to reopen and for supplemental decree.
Nov 8 2005	New Jersey's Reply Brief and Supplemental Appendix in Support of Motion to Reopen and for a Supplemental Decree Filed
Nov 9 2005	Motion DISTRIBUTED for Conference of November 23, 2005.
Nov 28 2005	The motion to Reopen and for Supplemental Decree is denied. The alternative motion for leave to file a Bill of Complaint is granted. The defendant is allowed 30 days within which to file an answer. This proceeding shall be docketed as Case No. 134 Original.
Dec 28 2005	Answer of State of Delaware and Motion for Appointment of Special Master filed.
Jan 4 2006	DISTRIBUTED for Conference of January 20, 2006.
Jan 9 2006	Opposition of New Jersey to motion of Delaware for appointment of Special Master filed. (Distributed)
Jan 17 2006	Reply of respondent Delaware in support of motion for appointment of Special Master filed. (Distributed)
Jan 23 2006	Motion for appointment of Special Master is granted and IT IS ORDERED that Ralph Lancaster, Esquire, of Portland, Maine, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic and clerical assistants, the cost of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.".
Sep 8 2006	Motion for allowance of fee and disbursements filed by Special Master.
Sep 20 2006	Motion DISTRIBUTED for Conference of October 6, 2006.
Oct 10 2006	The motion of the Special Master for allowance of fee and disbursements is GRANTED, and the Special Master is awarded a total of $65,532.12 for the period January 23, 2006, through August 31, 2006, to be paid equally by the parties.

Apr 16 2007	Report of the Special Master Received
Apr 17 2007	DISTRIBUTED for Conference of May 10, 2007.
May 14 2007	The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days.
May 21 2007	Motion for allowance of fee and disbursements filed by Special Master.
Jun 5 2007	DISTRIBUTED for Conference of June 21, 2007.
Jun 14 2007	Order extending time to file exceptions and supporting briefs to and including July 30, 2007.
Jun 25 2007	The motion of the Special Master for allowance of fee and disbursements is GRANTED, and the Special Master is awarded a total of $225,217.79 for the period September 1, 2006, through May 17, 2007, to be paid equally by the parties. Motion for allowance of fee and disbursements GRANTED.
Jul 30 2007	Exceptions by New Jersey to the Report of the Special Master and Supporting Brief filed.
Jul 30 2007	Brief amicus curiae of BP America Inc. and Crown Landing LLC filed.
Aug 24 2007	Order extending time to file replies to Exceptions to and including September 28, 2007
Sep 28 2007	Reply by Delaware to the Exceptions by New Jersey to the Report of the Special Master filed.
Oct 2 2007	DISTRIBUTED for Conference of October 12, 2007.
Oct 12 2007	CIRCULATED.
Oct 15 2007	The Exceptions to the Report of the Special Master are set for oral argument in due course. Justice Breyer took no part in the consideration or decision of this case.
Oct 15 2007	SET FOR ARGUMENT Tuesday, November 27, 2007.
Nov 27 2007	Argued. On Exceptions to the Report of the Special Master. For plaintiff: H. Bartow Farr, Washington, D.C. For respondent: David C. Frederick, Washington, D.C.

134

AUG 1 - 2005
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[redacted] Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE, PETITION, BRIEF AND APPENDIX IN SUPPORT OF MOTION

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* *Counsel of Record*

No. 11, Original

In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Comes now the State of New Jersey, by and through the Attorney General of the State of New Jersey, Peter C. Harvey, and respectfully asks the Court to reopen this matter and issue a supplemental decree in accordance with the Petition submitted herewith.

PETER C. HARVEY
Attorney General

July 28, 2005
Please address all
Communications to:

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No. 11, Original

In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

PETITION FOR SUPPLEMENTAL DECREE

The State of New Jersey, by and through its Attorney General, Peter C. Harvey, petitions this Court for a Supplemental Decree, and, in support of this petition, states as follows:

Jurisdiction of This Court

1. Pursuant to paragraph 5 of the 1935 Decree, this Court "retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree. . . ." 295 U.S. 694, 698 (1935).

2. Original jurisdiction is also proper here pursuant to Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C. § 1251(a).

3. The filing of this Petition has been authorized by the Acting Governor and by the Attorney General of New Jersey.

Introduction

4. This is a petition for a Supplemental Decree declaring that Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware. The State of New Jersey also seeks to enjoin the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and from enforcing any conditions attached to such permits.

Background

5. Prior to the 1934 decision in this case, the States of New Jersey and Delaware had disputed the location of their common boundary "almost from the beginning of statehood." *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). New Jersey consistently claimed that its title extended to the middle of the main shipping channel along the entire length of the Delaware River and Bay opposite the State of Delaware. In the lower River and Bay, below the twelve-mile radius from New Castle, Delaware (the "Twelve-Mile Circle"), Delaware claimed that its title extended to the geographical center of the River. Within the Twelve-Mile Circle, however, Delaware claimed that its title

extended to the low-water mark on the New Jersey shoreline. Delaware traced that title to a deed of feoffment and lease on August 24, 1682 from the Duke of York to William Penn. *Id.* at 364.

6. The validity of Penn's title was challenged not only during colonial times, but by the State of New Jersey following Independence. *Id.* at 369-70.

7. In 1877, New Jersey was granted leave by this Court to file a Bill of Complaint against Delaware to determine the boundary between the States in the Delaware River. (No. 1, Orig.) The suit was initiated after Delaware attempted to enforce its fishing laws against New Jersey fishermen. On March 26, 1877, following oral argument, the Court entered a preliminary injunction restraining Delaware "from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary." (Record, No. 1, Orig., at 53-54.) The Court's order recited that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . ." (*Id.* at 53.)

8. With the preliminary injunction in place, the case "slumbered for many years." 291 U.S. at 377. In 1903, however, in order to settle the then-pending dispute, commissioners appointed by both States negotiated the text of what later became the Compact of 1905. New Jersey ratified the Compact on April 8, 1903, 1903 N.J. Laws ch. 243, p.515 (Record, No. 11, Orig., Pl. Ex. 161 at 30), but the Delaware legislature failed to approve it. In February 1905,

both States re-appointed commissioners. 23 Del. Laws ch. 216 (1905) (Record, No. 11, Orig., Pl. Ex. 162 at 13); 1905 N.J. Laws ch. 42, p.67 (Record, No. 11, Orig., Pl. Ex. 161 at 32). They met in Philadelphia on February 18, 1905 and quickly agreed to the same provisions as in 1903 (*Id.*, Pl. Ex. 161 at 33-34). Delaware approved the Compact on March 20, 1905. 23 Del. Laws ch. 5 (1905) (Record, No. 11, Orig., Pl. Ex. 162 at 14-15). New Jersey did so the next day. 1905 N.J. Laws ch. 42, p.67 (Record, No. 11, Orig., Pl. Ex. 161 at 35). Congress ratified the Compact on January 24, 1907. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907).

9. Of particular importance to the present controversy is Article VII of the Compact of 1905, which provides:

> Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

10. Following ratification of the Compact by Congress, New Jersey's suit was dismissed without prejudice. 205 U.S. 550 (1907).

11. Although the 1905 Compact resolved numerous jurisdictional issues, it did not settle the boundary line. In 1925, a dispute arose over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle. The States were again unable to resolve the dispute, which had been left open by Article VI of the Compact of 1905. In 1927, this Court again granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle ("*New Jersey v.*

Delaware II"). (No. 11, Orig.) The Court appointed a Special Master, who submitted his report on October 9, 1933. The Report of the Special Master is reported at 55 S. Ct. 934 (1933). Both States filed exceptions.

12. On February 5, 1934, the Court issued an opinion confirming the Special Master's report. 291 U.S. at 385. As to that portion of the River within the Twelve-Mile Circle, the Court set the boundary at the mean low-water line on the New Jersey shore, "subject to the Compact of 1905." *Id.* As to the boundary in the lower River and Bay, the Court set the line in the middle of the main shipping channel. *Id.*

13. New Jersey does not dispute the location of its boundary with the State of Delaware. However, that boundary is subject to the Compact of 1905.

14. Paragraph 5 of the 1935 Decree provided that this Court "retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree." 295 U.S. at 698. Paragraph 6 provided that "the State of Delaware, its officers, agents, and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree. . . " and the State of New Jersey was similarly enjoined. *Id.* at 698-99. Paragraph 7 provided that the Decree was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." *Id.* at 699.

New Jersey's Riparian Jurisdiction Within the Twelve-Mile Circle

15. The State of New Jersey, since the 1800's, has exercised riparian jurisdiction and regulated its riparian lands on its own side of the Delaware River, including within the Twelve-Mile Circle.

16. Between 1854 and 1871, the New Jersey Legislature enacted five separate grants within the Twelve-Mile Circle for the construction of various piers and wharves extending from the New Jersey shore beyond the low-water mark into the Delaware River. 1854 N.J. Laws ch. 143, p.375 (Record, No. 11, Orig., Pl. Ex. 41); 1855 N.J. Laws ch. 109, p.274 (Record, No. 11, Orig., Pl. Ex. 42); 1870 N.J. Laws ch. 131, p.346 (Record, No. 11, Orig., Pl. Ex. 48); 1870 N.J. Laws ch. 344, p. 726 (Record, No. 11, Orig., Pl. Ex. 44); 1871 N.J. Laws ch. 307, p.758 (Record, No. 11, Orig., Pl. Ex. 43).

17. Beginning in 1883, also within the Twelve-Mile Circle, the New Jersey Board of Riparian Commissioners, and later its successor agencies, issued numerous riparian grants to private owners for submerged lands and structures extending below the low-water mark into the Delaware River. (*See* Report of the Special Master at 52, citing Pl. Exs. 57-92, 94-97).

18. On at least eight occasions from 1854 to 1905, the State of New Jersey approved riparian grants extending below the mean low-water line in the Twelve-Mile Circle. These grants also authorized the building of riparian structures on lands extending beyond the low-water line. From 1905 to the present, on at least thirty-three occasions,

New Jersey similarly issued riparian grants extending below the mean low-water line within the Twelve-Mile Circle.

19. In its briefs and arguments in *New Jersey v. Delaware II*, Delaware repeatedly acknowledged both the right of New Jersey citizens to wharf out to navigable water within the Twelve-Mile Circle, and the exclusive right of New Jersey to regulate the exercise of those riparian rights. For instance, in its Reply Brief to the Special Master, Delaware stated: "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." (Reply Brief of the Defendant Before the Special Master at 9 (Bound Volume 15).) Delaware further conceded New Jersey's exclusive regulatory authority over such rights in its oral argument before the Special Master:

> We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do. (Argument of Clarence A. Southerland, Esq. for Delaware, Oral Argument Before the Special Master, September 12, 1932, at 91 (Bound Volume 15).)

Mr. Southerland, Delaware's counsel, served as the Attorney General of Delaware from 1925 to 1929, and as the first Chief Justice of the Supreme Court of Delaware from 1951 to 1963.

20. On or about December 2, 1957, S. Samuel Arsht, Esq., counsel to the Delaware State Highway Department, advised the Department that it was his opinion that, pursuant to the 1905 Compact and this Court's decision in No. 11, Orig., the State of Delaware did not have jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. Acting on that advice, the Delaware State Highway Department adopted a resolution on December 11, 1957, directing its Chief Engineer to notify the U.S. Army Corps of Engineers that "while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted." The Delaware State Highway Department notified the U.S. Army Corps of Engineers on or about December 13, 1957, that "[a]t the December 11th meeting of the Delaware State Highway Department it was determined that the Corps of Engineers be requested to continue to supply the Delaware State Highway Department with information regarding proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers be held up or otherwise delayed by failure of the Delaware State Highway Department to act upon it." The letter advised, by contrast, that "[i]f any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department."

The Present Controversy

21. Delaware currently has two State permitting requirements applicable to waterway construction activities in Delaware waters. Both permit programs are administered

by the Delaware Department of Natural Resources and Environmental Control ("DNREC").

22. In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The DCZA declares that it is Delaware's policy "to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas." *Id.* § 7001. The DCZA provides that certain uses are "absolutely prohibited" in the Delaware coastal zone. *Id.* § 7003. It forbids "[h]eavy industry uses of any kind" as well as any "offshore gas, liquid or solid bulk product transfer facilities" that were "not in operation on June 28, 1971." *Id.* The Port of Wilmington is exempted from the prohibition on "bulk product transfer facilities." *Id.* § 7002(f). Industrial development other than that of heavy industry requires a permit issued by the Secretary of DNREC. *Id.* § 7004. Persons who violate the DCZA are subject to a fine of up to $50,000 per day for each day of the violation. *Id.* § 7011.

23. On December 13, 1991, DNREC issued a DCZA permit to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. ("Logan"), to construct a 1550-foot pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey. Since 1991, to New Jersey's knowledge the only other applicant for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing, LLC, *infra*.

24. In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the "DSLA"). The DSLA provides that "[n]o person shall deposit material upon

or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department." *Id.* § 7205(a). The DSLA also provides "[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands." *Id.* § 7210. Violations of the DSLA are punishable by civil fines and criminal penalties. *Id.* § 7214.

25. To date, the DSLA has been applied to only a limited number of projects on the New Jersey side of the River. DNREC issued a DSLA permit to Logan on September 30, 1991 for the pier and water intake structure mentioned above. In March 2005, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to "The Riverwalk at Penns Grove," a 12-acre redevelopment project in the Borough of Penns Grove, Salem County, New Jersey, discussed, *infra*.

26. On September 16, 2004, Crown Landing, LLC submitted an application to the Federal Energy Regulatory Commission ("FERC") to construct and operate a liquefied natural gas import terminal and re-gasification facility in Logan Township, Gloucester County, New Jersey. This project requires a pier appurtenant to the New Jersey shoreline that would extend approximately 2,000 feet beyond the mean low water line into the Delaware River on the New Jersey side of the main channel within the Twelve-Mile Circle.

27. The New Jersey Board of Public Utilities has advised FERC that the Crown Landing project should "play an important part in ensuring a competitive and reliable

supply of natural gas to New Jersey's and the region's energy customers."

28. On October 29, 2004, DNREC declined to issue a DSLA permit for the pier until Crown Landing first obtained a DCZA permit.

29. Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. On February 3, 2005, the Secretary concluded that the Crown Landing project represented both an "offshore bulk transfer facility" as well as a "heavy industry use" that were specifically prohibited by the DCZA. The Secretary also concluded -- with reference to structures located entirely within the State of New Jersey -- that "the on-shore storage tanks essential to the operation of the facility are prohibited structures."

30. Crown Landing appealed the Secretary's decision to the Delaware State Coastal Zone Industrial Control Board, pursuant to Del. Code Ann. tit. 7, § 7007 (2005). That Board affirmed the Secretary's determination on March 31, 2005. That determination has now become final.

31. Delaware's imposition of a permit requirement for the Crown Landing project violates New Jersey's rights under Article VII of the Compact of 1905 because it interferes with New Jersey's exclusive State riparian jurisdiction over riparian improvements appurtenant to the New Jersey shore of the Delaware River.

32. On July 13, 2004, Fenwick Commons, LLC, applied to DNREC for a Subaqueous Lands Lease and Water Quality Certification to refurbish a 750-foot long pier and

other structures, and to fill 1,882 square feet of tidal lands at Penns Grove, Salem County, New Jersey. Fenwick Commons notified Delaware on May 6, 2005, that "financing considerations" compelled it to obtain the Delaware permit in order to proceed with the project. But Fenwick Commons nonetheless stated: "the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m." On May 10, 2005, DNREC approved a Subaqueous Lands Lease to Fenwick Commons, L.L.C. The lease has a term of twenty years and is renewable.

33. The Fenwick Commons pier occupies lands that were the subject of: an act of the State of New Jersey 150 years ago incorporating the Pennsgrove Pier Company (1855 N.J. Laws ch. 109, p. 274); a New Jersey tidelands grant dated March 21, 1916 (recorded in Salem County, New Jersey, in Deed Book 130, page 383); and a New Jersey tidelands grant to French's Hotel Company dated October 17, 1921 (recorded in Salem County, New Jersey, in Deed Book 166, page 330). The taxability of this granted area by the municipality of Penns Grove in New Jersey was the subject of the New Jersey Superior Court Chancery Division's decision in *Main Associates, Inc. v. B & R Enterprises, Inc.*, 74 N.J. Super. 483, 181 A.2d 541 (Ch. Div. 1962). The pier is taxed by the Borough of Penns Grove, and depicted on its tax maps as Block 57, Lot 6. In *State of New Jersey v. Federanko*, 26 N.J. 119, 139 A.2d 30 (1958), the Supreme Court of New Jersey upheld the authority of New Jersey to exercise criminal jurisdiction over gambling offenses committed on this pier. In sum, New Jersey has asserted jurisdiction over this specific structure by legislative action in 1855, by executive actions in 1916 and 1921, and by judicial actions in 1958 and 1962.

34. Delaware's requirement that Fenwick Commons obtain a Subaqueous Lands Lease violates the terms of the Compact of 1905, which protected New Jersey's rights to exercise riparian jurisdiction of every kind and nature on its side of the Delaware River, and to make grants, leases, and conveyances of riparian lands. Further, this Lease purports to assess a fee for the filling of lands on the New Jersey side of the Delaware River. New Jersey's prior approval for the filling of any riparian lands has been required since 1891. N.J. Stat. Ann. § 12:3-4 (1979). New Jersey's review of applications to allow such filling has been a part of its exercise of riparian jurisdiction since the Wharf Act of 1851, and the 1891 prohibition on filling of riparian lands without its approval. Delaware's 2005 lease interferes with New Jersey's riparian jurisdiction and its riparian grants to Fenwick Commons, in violation of Article VII of the Compact of 1905.

35. Because of its irregular shape, New Jersey's shoreline within the Twelve-Mile Circle along the Delaware River is approximately 29 miles long. Six municipalities and two counties of New Jersey have boundaries within this area: Logan Township, Gloucester County and Oldmans Township, Penns Grove Township, Carneys Point Township, Pennsville Township and Elsinboro Township, all in Salem County.

36. Delaware's exercise of riparian jurisdiction on the New Jersey side of the River within the Twelve-Mile Circle interferes with New Jersey's sovereign right under the Compact of 1905 to regulate the riparian rights of its own citizens in this area, and has effectively blocked the Crown Landing project. Delaware's continued interference with the exercise of New Jersey's riparian jurisdiction may

discourage economic development along this part of New Jersey's shoreline.

37. The State of New Jersey owns riparian shoreline within the Twelve-Mile Circle. Thus, Delaware's actions also threaten the construction of projects by the State of New Jersey itself within the Twelve-Mile Circle.

38. Income from New Jersey's riparian lands program has been dedicated to New Jersey's Fund for the Support of Free Public Schools since at least 1898. N.J. Stat. Ann. § 18A:56-5 and -6 (1999). Over the long term, a negative effect on development along the New Jersey shoreline within the Twelve-Mile Circle will diminish the income received by the State of New Jersey for conveyances and leases of riparian lands and will reduce the income received by the State's School Fund.

39. Delaware's regulation of riparian improvements on the New Jersey side of the River within the Twelve-Mile Circle conflicts with Article VII of the Compact of 1905 and interferes with the rights reserved to New Jersey by paragraph 7 of the 1935 Decree. Even in the absence of the Compact, Delaware's exercise of authority under the DCZA to prohibit entire categories of riparian activity that New Jersey may choose to allow would violate New Jersey's rights under federal common law.

Attempts to Resolve This Matter

40. The Federal Coastal Zone Management Act ("FCZMA") was enacted in 1972 to encourage cooperation between federal, state and local coastal zone management activities, but does not modify or supersede any interstate compact. 16 U.S.C. §1452(4),(5); 16 U.S.C. §1456(e)(1). After enactment of the FCZMA, New Jersey prepared its

own coastal zone management plan in 1978 and 1980, in which it recognized potential conflicts that could arise with Delaware over regulation of projects within the Twelve-Mile Circle and the need for coordination between the States for such projects. For a period of time in the early 1990s, New Jersey and Delaware sought a means for resolving these potential conflicts through a formal agreement. However, New Jersey abandoned its efforts to reach a formal agreement in 1994, based on concerns that such an agreement would create an overly cumbersome approval process and would give Delaware effective veto power over projects on the New Jersey side of the Delaware River.

41. Recently, New Jersey state officials have sought without success to persuade Delaware that its exercise of riparian jurisdiction on the New Jersey side of the River violates Article VII of the Compact of 1905. On April 11, 2005, following informal efforts to reach a settlement, Paul T. Fader, the Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, formally advised Delaware that, under the Compact of 1905, "Delaware does not have jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline."

42. Delaware responded by letter dated May 9, 2005, from Joseph C. Schoell, Legal Counsel to the Governor of Delaware, Ruth Ann Minner. Delaware rejected New Jersey's contentions and claimed that the Compact of 1905 limited New Jersey's riparian jurisdiction solely to New Jersey's territory above the low water mark on the New Jersey shore.

43. Other efforts to resolve the dispute have proven futile. For instance, on May 2, 2005, the New Jersey State Assembly unanimously adopted a resolution urging the Governor and General Assembly of Delaware to amend the

DCZA to make clear that it "does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact." A. Res. 260, 211th Leg. (N.J. 2005). The identical resolution is currently pending in the New Jersey Senate. S. Res. 100, 211th Leg. (N.J. 2005).

44. On June 27, 2005, thirty-one New Jersey legislators introduced a bill requiring that New Jersey state pension funds be withdrawn from Delaware banks unless Delaware conforms its permitting laws to respect New Jersey's rights under the 1905 Compact. State of New Jersey Assembly Bill No. A4287.

45. Delaware has refused to change its position in response to these initiatives. Instead, on June 29, 2005, two Delaware legislators responded by introducing legislation authorizing the Governor to call on the National Guard of Delaware to remove any "encroachments" upon Delaware's boundary. State of Delaware House of Representatives Bill No. 296. Thus, notwithstanding its statements before this Court in the 1930s, Delaware has refused to acknowledge that the Compact of 1905 grants New Jersey exclusive riparian jurisdiction on the New Jersey side of the Delaware River within the Twelve-Mile Circle.

Prayer for Relief

Wherefore, the State of New Jersey prays that the Court enter a Supplemental Decree:

1. Declaring that Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New

Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware;

2. Enjoining the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and further enjoining Delaware from enforcing any conditions attached to any such permits; and

3. Awarding the State of New Jersey such other relief as the Court deems just and proper.

Respectfully submitted,

Peter C. Harvey
Attorney General of New Jersey

July 28, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

BRIEF IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

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QUESTION PRESENTED FOR REVIEW

The Compact of 1905 between the States of New Jersey and Delaware established the States' respective jurisdiction over the Delaware River, but not the boundary line between them. With respect to jurisdiction over riparian rights, Article VII of the Compact provided that:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

Nearly three decades later, this Court settled the boundary line, which had been previously disputed by Delaware and New Jersey "almost from the beginning of statehood." *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). As to the boundary within the twelve-mile circle of New Castle, Delaware (the "Twelve-Mile Circle"), the Court established the line at the mean low-water mark on the New Jersey shore, "subject to the Compact of 1905." *Id.* at 385. Paragraph 7 of the 1935 Decree provided that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." 295 U.S. 694, 699 (1935).

The question presented here is whether the Compact of 1905 grants New Jersey exclusive State riparian jurisdiction over improvements appurtenant to the New Jersey side of the Delaware River within the Twelve-Mile Circle, free from regulation by Delaware.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ix

Brief

INTRODUCTION 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

SUMMARY OF ARGUMENT 3

STATEMENT OF THE CASE 5

A. *New Jersey v. Delaware I* and the Compact of 1905 .. 5

B. New Jersey's Exercise of Riparian Jurisdiction..... 8

C. *New Jersey v. Delaware II* 10

D. The Present Controversy 11

1. Delaware's Recent Regulation of Structures on New Jersey's Shore 11

2. New Jersey's Efforts to Resolve the Controversy 16

LEGAL ARGUMENT 17

I. THE COURT SHOULD EXERCISE ITS CONTINUING ORIGINAL JURISDICTION TO ENFORCE THE 1905 COMPACT 17

II. THE COURT SHOULD ENJOIN DELAWARE FROM FURTHER VIOLATIONS OF THE 1905 COMPACT 22

A. The Plain and Unambiguous Language of the Compact of 1905 Confirms that New Jersey Retained Riparian Jurisdiction Over Structures Extending Below the Low-Water Mark on the New Jersey Shore, Free From Regulation by Delaware 24

B. Delaware's Previous Admissions and the Parties' Construction of the Compact Demonstrate New Jersey's Right to Regulate Riparian Users On Its Own Side of the River, Free From Regulation by Delaware 27

1. Delaware's Concessions in *New Jersey v. Delaware II* Confirm that New Jersey Has Exclusive State Riparian Jurisdiction ... 27

2. The Plain and Unambiguous Language of the 1905 Compact is Reinforced by the States' Construction of the Compact 30

III. IT IS UNNECESSARY TO APPOINT A SPECIAL MASTER 33

CONCLUSION 34

Appendix

1. The Compact of 1905, Act of January 24, 1907, ch. 394, 34 Stat. 858 (1907) 1a

2. Decree, *New Jersey v. Delaware*, Orig. No. 11, June 3, 1935, 295 U.S. 694 (1935) 8a

3. Letter of Paul T. Fader, Chief Counsel to Acting Governor of New Jersey Richard J. Codey, to Joseph Schoell, Legal Counsel to Governor of Delaware Ruth Ann Minner, dated April 11, 2005 ..... 17a

4. Letter of Joseph C. Schoell, Legal Counsel to Governor Of Delaware Ruth Ann Minner, to Paul T. Fader, Chief Counsel to Acting Governor of New Jersey Richard J. Codey, dated May 9, 2005 ..... 21a

5. Affidavit of Richard Castagna, dated June 27, 2005 ..... 25a

6. Affidavit of Richard Castagna, Exhibit A- Map of New Jersey Riparian Grants Extending Beyond Mean Low Water Line Within the Twelve Mile Circle Of New Castle 54a

7. Affidavit of Jeffrey Reading, dated June 23, 2005 ..... 55a

8. Affidavit of Frederick Sickels, dated June 22, 2005 ..... 61a

9. Affidavit of Kevin Broderick, dated June 16, 2005 ..... 66a

10. Affidavit of Steven C. Whitney, dated July 27, 2005 ..... 73a

11. Affidavit of Jeanne M. Fox, dated June 20, 2005 ..... 78a

12. Affidavit of Amy Donlon, dated July 25, 2005 ..... 84a

13. Affidavit of Amy Donlon, Exhibit A - Freedom of Information Request, dated May 17, 2005..... 97a

14. Affidavit of Amy Donlon, Exhibit B - May 31, 2005 Freedom of Information Act Letter 100a

15. Affidavit of Amy Donlon, Exhibit C - September 30, 1957 Letter from Mr. Skinner (DuPont) to Mr. Haber (Delaware State Highway Department) 102a

16. Affidavit of Amy Donlon, Exhibit D - October 25, 1957 Letter from Mr. Haber to Mr. Skinner 105a

17. Affidavit of Amy Donlon, Exhibit E - December 2, 1957 Letter from S. Samuel Arsht, Esq. to Mr. Haber 106a

18. Affidavit of Amy Donlon, Exhibit F - December 13, 1957 Letter from Mr. Haber to U.S. Army Corps of Engineers 108a

19. Affidavit of Amy Donlon, Exhibit G - January 8, 1958 Letter from S. Samuel Arsht, Esq. to Mr. Skinner ..109a

20. Affidavit of Amy Donlon, Exhibit H - February 10, 1971 Letter from Mr. Skinner to John C. Bryson . . 111a

21. Affidavit of Amy Donlon, Exhibit I, June 7, 1971 Letter from E.T. Fogg to Mr. B.E. Lane 115a

22. Affidavit of Amy Donlon. Exhibit J - 1971 Lease Granted to DuPont by DNREC 118a

23. Affidavit of Amy Donlon, Exhibit K - October 23, 1981 Letter from Delaware DAG MacArtor to Mr. Skinner 126a

24. Affidavit of Amy Donlon, Exhibit L - October 27, 1981 Letter from Mr. Skinner to Delaware DAG MacArtor. 128a

25. Affidavit of Amy Donlon, Exhibit M - May 6, 2005 Letter from Warren H. Carr, Esq. to John A. Hughes, Secretary, DNREC 131a

26. Declaration of Lauren B. Segal, dated June 27, 2005 ..... 133a

27. Declaration of Lauren B. Segal, Exhibit 1, dated October 29, 2004 ..... 144a

28. Declaration of Lauren B. Segal, Exhibit 2, dated February 3, 2005 ..... 146a

29. Declaration of Lauren B. Segal, Exhibit 3, dated March 31, 2005 ..... 148a

30. Declaration of Lauren B. Segal, Exhibit 4, dated April 18, 2005 ..... 150a

31. Declaration of Lauren B. Segal, Exhibit 5, dated May 24, 2005..... 152a

32. State of New Jersey Assembly Resolution No. 260, adopted May 2, 2005 ..... 155a

33. State of New Jersey Senate Resolution No. 100, introduced May 19, 2005 ..... 159a

34. Brief for Plaintiff on Exceptions to the Report of the Special Master, *New Jersey v. Delaware*, Dated December 18, 1933 (Excerpt, Compact of 1905) . .165a

35. Reply Brief of Defendant Before Special Master, *New Jersey v. Delaware*, October Term 1929 (Excerpt, Point I) 176a

36. Transcript of Oral Argument Before Special Master, *New Jersey v. Delaware*, September 12, 1932 (Excerpt) 189a

37. Defendant's Requests for Findings of Fact and Conclusions of Law, *New Jersey v. Delaware*, October Term, 1929 ..... 193a

38. Reply Brief of Defendant on Exceptions to the Report of the Special Master, *New Jersey v. Delaware*, October Term, 1933 (Excerpt, Boundary In the Twelve- Mile Circle) 204a

39. Report of the Special Master, *New Jersey v. Delaware*, October Term, 1933 (Excerpts: Exercise of Jurisdiction Over the Delaware River Within the Circle, Findings of Fact, Conclusions of Law, Recommendations for a Decree) 239a

40. State of New Jersey Assembly Bill No. A4287, introduced June 27, 2005 ..... 261a

41. State of Delaware House of Representatives Bill No. 296 (Introduced June 29, 2005) 266a

42. New Jersey's Proposed Supplemental Decree 269a

TABLE OF AUTHORITIES

Cases

California ex rel. State Lands Comm'r v. United States, 457 U.S. 273 (1982) 34

City of Wilmington v. Parcel of Land, 607 A.2d 1163 (Del. 1992) 25

Cuyler v. Adams, 449 U.S. 433 (1981) 23

EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) 31

Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435 (Del. Ch. 1882) 25

Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) 31

Main Assocs. Inc. v. B&R Enters., Inc., 181 A.2d 541 (N.J. Super. Ct. Ch. Div. 1962) 31

Massachusetts v. Missouri, 308 U.S. 1 (1939) 21

Mayor of Newark v. Sayre, 45 A. 985 (N.J. 1900) 24-25

Mississippi v. Louisiana, 506 U.S. 73 (1992) 18, 19, 20

Nebraska v. Wyoming, 325 U.S. 589 (1945) 19

Nebraska v. Wyoming, 479 U.S. 1051 (1987) 19

New Hampshire v. Maine, 532 U.S. 742 (2001) 34

New Jersey v. Delaware I, 205 U.S. 550 (1907) 8

New Jersey v. Delaware II (Order), 279 U.S. 825 (1929) ..10

New Jersey v. Delaware II (Special Master's Report), 55 S.Ct. 934 (1933) 10

New Jersey v. Delaware II (Decision), 291 U.S. 361 (1934) ..... *passim*

New Jersey v. Delaware II (Decree), 295 U.S. 694 (1935) ..... *passim*

New Jersey v. Federanko, 139 A.2d 30 (N.J. 1958) 31

New Jersey v. New York, 523 U.S. 767 (1998) 23

Oklahoma v. New Mexico, 501 U.S. 221 (1991) ... 20, 21, 23

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 23

Texas v. New Mexico, 462 U.S. 554 (1983) 21, 23

Texas v. New Mexico, 482 U.S. 124 (1987) 23

Virginia v. Maryland, 540 U.S. 56 (2003) ..16, 20, 23, 27, 34

Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) 26

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) .. 21

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 20

Constitutional Provisions

Article III, Section 2, Clause 2 ..... 2, 17

Statutes

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907) ... 2, 8, 24

16 U.S.C. § 1452(4),(5) 15

16 U.S.C. § 1456 ..... 14, 15

28 U.S.C. § 1251(a) 2, 18

23 Del. Laws ch. 5 (1905) 7

58 Del. Laws ch. 175 (1971) 11

65 Del. Laws ch. 508 (1986) 12

Del. Code Ann. tit. 7, §§ 7001-7013 (2005) 11

Del. Code Ann. tit. 7, § 7001 (2005) 12

Del. Code Ann. tit. 7, § 7002(f) (2005) 12

Del. Code Ann. tit. 7, § 7003 (2005) 12

Del. Code Ann. tit. 7, § 7004 (2005) 12

Del. Code Ann. tit. 7, § 7011 (2005) 12

Del. Code Ann. tit. 7, §§ 7201-7217 (2005) 12

Del. Code Ann. tit. 7, § 7205 (2005) 12, 22

Del. Code Ann. tit. 7, § 7210 (2005) 12

Del. Code Ann. tit. 7, § 7214 (2005) 12, 22

1851 N.J. Laws 335 ..... 8, 25

1854 N.J. Laws ch. 143 26

1855 N.J. Laws ch. 109 26

1871 N.J. Laws ch. 307 26

1905 N.J. Laws ch. 42 7

N.J. Stat. Ann. § 12:3-1 (1979) 8

N.J. Stat. Ann. § 12:3-2 (1979) 8

N.J. Stat. Ann. § 12:3-10 (1979) 8, 25

N.J. Stat. Ann. § 12:3-12 (1979) 25

N.J. Stat. Ann. § 12:3-21 (1979) 25

N.J. Stat. Ann. § 12:5-3 (1979) 9

Other Authorities

Webster's Unabridged Dictionary (1898) 24

Black's Law Dictionary (8th ed. 2004) 3

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

BRIEF IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

INTRODUCTION

The State of New Jersey submits this brief in support of its motion to reopen No. 11, Original, in order to obtain a supplemental decree enforcing New Jersey's sovereign rights under the Compact of 1905 with the State of Delaware. New Jersey is not disputing the location of the boundary between the States, which this Court decided in 1934. That boundary decision, however, was made expressly subject to the Compact of 1905. Accordingly, New Jersey seeks a declaration that the Compact of 1905 grants New Jersey exclusive riparian jurisdiction over waterfront improvements extending from the New Jersey shoreline into the Delaware River within an area known as the Twelve-Mile Circle.[1] New Jersey further seeks to restrain Delaware from asserting

[1] The Twelve-Mile Circle refers to an area encompassed by a circle centered at New Castle, Delaware, that was the subject of a conveyance from the Duke of York to William Penn in 1682. *See New Jersey v. Delaware*, 291 U.S. 361, 364 (1934).

riparian jurisdiction over such improvements on New Jersey's side of the River.

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, 28 U.S.C. § 1251(a), and paragraph 5 of the 1935 Decree in No. 11, Original, 295 U.S. 694, 698 (1935).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Art. III, § 2, cl. 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

28 U.S.C. § 1251(a), Original Jurisdiction:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Article VII of the Compact of 1905:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). (App. 5a.)

SUMMARY OF ARGUMENT

Until this Court settled the boundary line in 1934, New Jersey and Delaware had disputed the location of the boundary almost since their formation as independent States. *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). In 1905, while the first boundary suit was pending (No. 1, Orig.), the States entered into a Compact that settled their jurisdictional disputes while leaving the boundary line unresolved. This Court ultimately settled the line in 1934, *id.* at 385, and entered its decree in 1935, 295 U.S. at 694 ("Decree") (App. 8a). Within the Twelve-Mile Circle, the Court established the boundary at the mean low-water line on the New Jersey side, "subject to the Compact of 1905." 291 U.S. at 385.[2] The Decree was made "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." 295 U.S. at 699.

Article VII of the 1905 Compact clearly protects New Jersey's right to regulate waterfront improvements extending from the New Jersey shoreline into the Delaware River within the Twelve-Mile Circle. In fact, in the proceedings before the Court and the Special Master, Delaware conceded that the 1905 Compact expressly reserved New Jersey's exclusive right to exercise riparian jurisdiction on its side of the Delaware River. Consistent with this understanding of the 1905 Compact, after the boundary line was settled, New Jersey continued to exercise riparian jurisdiction on its side of the Delaware River east of the main channel.

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[2] The "low-water mark" of a river is defined as "the point to which the water recedes at its lowest stage." Black's Law Dictionary 1623 (8th ed. 2004).

In March 2005, for the first time, Delaware invoked its laws to block the construction of a pier on the New Jersey side of the Delaware River. Delaware has also recently applied its state permitting laws to other projects on the New Jersey side, including an historic pier in Penns Grove, New Jersey, on riparian lands granted by New Jersey in 1916 and 1921.

New Jersey has protested Delaware's assertions of jurisdiction, but its efforts to resolve this conflict amicably have been unsuccessful. Accordingly, New Jersey seeks to reopen No. 11, Original, pursuant to paragraph 5 of the 1935 Decree, in order to obtain a supplemental decree clarifying New Jersey's rights and enjoining Delaware from asserting riparian jurisdiction over proposed waterfront improvements on New Jersey's side of the Delaware River within the Twelve-Mile Circle.

The Court should exercise its continuing jurisdiction under the 1935 Decree to resolve this dispute. The controversy is grave and important. Its resolution will determine whether New Jersey can exercise its sovereign right to regulate the riparian rights of its own citizens along its own shoreline within the Twelve-Mile Circle, free of regulation by Delaware. The answer also will determine whether Delaware can interfere with New Jersey's regulation of growth and development in this area. No alternative forum exists to resolve this issue, and only this Court can interpret the 1905 Compact in a manner that will bind its signatories.

The plain language of the 1905 Compact expressly confirmed that New Jersey would be able to exercise exclusive State riparian jurisdiction over structures on its own side of the Delaware River. Article VII provided that each State, "on its *own* side of the river," may "*continue*" to

exercise "*riparian jurisdiction* of *every kind and nature*" under the "laws of the *respective* states" (emphasis added.) These words demonstrate that such "riparian jurisdiction" would be interpreted broadly and that each State would be able to exercise exclusive "riparian jurisdiction" on its side of the River. The use of the word "continue" is also significant. Long before the Compact of 1905, New Jersey regulated riparian grants and improvements on its side of the River, including within the Twelve-Mile Circle. New Jersey continued to do so after the Compact of 1905. And it is only relatively recently that Delaware has attempted to interfere with New Jersey's exercise of its riparian jurisdiction.

Because the Compact is clear and unambiguous, it is unnecessary to appoint a special master. New Jersey respectfully submits that the case should be briefed, argued, and decided in the October 2005 term.

STATEMENT OF THE CASE

A. *New Jersey v. Delaware I* and the Compact of 1905.

The Compact of 1905 resulted from a dispute over the States' competing claims of sovereignty and jurisdiction in the Delaware River. In 1871, Delaware enacted a law that required non-residents to obtain a Delaware license to fish in the River. (Record, No. 11, Orig., Pl. Ex. 161 at 10.) When Delaware arrested New Jersey fishermen pursuant to this law in 1872, New Jersey's Governor protested this infringement upon the State's authority and issued a proclamation asserting New Jersey's claim to jurisdiction over the eastern half of the Delaware River. (*Id.* at 7, 10.)

When the States' efforts to settle the dispute proved unsuccessful, New Jersey filed suit here to determine the boundary line in the Delaware River. (*Id.* at 23-25.) This Court granted New Jersey leave to file a bill of complaint ("*New Jersey v. Delaware I*") (Record, No. 1, Orig., at 5), and issued a preliminary injunction restraining Delaware "from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary." (*Id.* at 53-54.) This Court's preliminary injunction order explained that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . ." (*Id.* at 53.)

With the preliminary injunction in place, the case lingered for over twenty-five years until, in 1903, the States appointed commissioners to resolve the dispute. (Record, No. 11, Orig., Pl. Ex. 161 at 25-33.) The commissioners met in Philadelphia on March 12 and 14, 1903, and they negotiated the text of what later became the Compact of 1905. (*Id.* at 29-31.)

The Compact did not establish the boundary line, but it did resolve numerous jurisdictional issues. The Compact established the authority of each State to serve criminal and civil process on the River (Articles I, II). (App. 2a-3a.) It addressed common fishing rights and laws (Articles III-VI). (App. 3a-5a.) Article VII, at issue in this case, specifically confirmed each State's riparian rights and jurisdiction to regulate such rights. (App. 5a.)

Article VIII of the Compact provided: "[n]othing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." (App. 5a.)

Article IX provided that, once approved by the States and ratified by Congress, the Compact "shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court . . . shall be discontinued . . . without prejudice." (App. 6a.)

In describing the Compact to the New Jersey Legislature, the New Jersey commissioners stated:

> [W]hile it was not found practicable to settle the exact geographical boundary line between the two States, nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time. (Record, No. 11, Orig., Pl. Ex. 161 at 29.)

Although Delaware initially failed to approve the Compact, the States reappointed commissioners and, in 1905, quickly agreed to the same provisions as in 1903. (Record, No. 11, Orig., Pl. Ex. 161 at 32-34, Pl. Ex. 162 at 13-15.) Delaware approved the Compact on March 20, 1905, 23 Del. Laws ch. 5 (1905), and New Jersey did so the next day, 1905 N.J. Laws ch. 42, p.67. Congress ratified the Compact on January 24, 1907, with the proviso that "nothing contained therein shall be construed to impair or in any manner affect any right or jurisdiction of the United States in

and over the islands or waters which form the subject of said agreement." Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). *New Jersey v. Delaware I* was then dismissed without prejudice. 205 U.S. 550 (1907).

B. New Jersey's Exercise of Riparian Jurisdiction.

New Jersey has regulated its riparian lands, including within the Twelve-Mile Circle, since the 1800s. Before 1851, State riparian lands were regulated primarily through local custom. (*See* Castagna Aff. ¶ 3, App. 28a.)[3] In 1851, the Legislature enacted the Wharf Act, which required riparian landowners to obtain permission from their counties for development that would extend past the mean low-water line. 1851 N.J. Laws 335. The Wharf Act also provided that such permission could not be granted if the development would hinder navigation. *Id.* Then, in 1864, the Legislature created the Board of Riparian Commissioners, the earliest predecessor to the current Tidelands Resource Council. N.J. Stat. Ann. § 12:3-1 (1979) (enacted in 1864). The Board subsequently was authorized and directed to set bulkhead and pierhead lines in certain areas of the State. N.J. Stat. Ann. § 12:3-2 (1979) (enacted in 1869). In 1871, the Board's authority was expanded to encompass all tidal waters of the State, and included authority over approval of grants or leases of State riparian interests. N.J. Stat. Ann. § 12:3-10 (1979) (enacted in 1871).

Since its formation, the Tidelands Resource Council and its predecessors have determined whether to convey riparian lands or rights and have imposed regulatory conditions on such conveyances. (*See* Castagna Aff. ¶¶ 6, 7,

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[3] "Castagna Aff." refers to the Affidavit of Richard Castagna in Support of Motion To Reopen And For A Supplemental Decree, found at App. 25a.

App. 28a, 29a.) In 1914, the Legislature enacted the Waterfront Development Law. N.J. Stat. Ann. § 12:5-3 (1979). The law required that permits be obtained from the Board of Commerce and Navigation (later made part of the Department of Environmental Protection) to build structures on riparian lands or to legalize structures already in place. *Id.* New Jersey's approach to regulating the State's riparian lands has remained essentially unchanged since 1914, except that in 1978 the Tidelands Resource Council determined that its conveyances would be conditioned upon an applicant's obtaining all required State, federal, and local regulatory permits. (*See* Castagna Aff. ¶ 7, App. 29a.)

From its earliest days, the State of New Jersey has applied its regulatory system to lands on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Indeed, on at least eight occasions from 1854 to 1905, the New Jersey Legislature and then the Board of Riparian Commissioners approved various riparian grants extending below the mean low-water line in the Twelve-Mile Circle area. (*See* Castagna Aff. ¶ 8, App. 29a, 31a-36a, 54a.) And from 1905 to the present, New Jersey has exercised its riparian jurisdiction in this area on at least thirty-three occasions by approving State tidelands conveyances within the Twelve-Mile Circle. (*Id.*, App. 29a, 36a-51a, 54a.)[4]

In recent decades, the Legislature has further expanded New Jersey's regulation of riparian lands, including those within the Twelve-Mile Circle, by imposing additional regulatory and permitting requirements. (*See* Reading Aff. ¶¶ 3-5, App. 56a-57a; Sickels Aff. ¶¶ 2-6, App.

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[4] A map showing the approximate location of New Jersey's riparian grants within the Twelve-Mile Circle is found at App. 54a.

62a-63a; Broderick Aff. ¶¶ 4-5, App. 67a-68a.)[5] New Jersey has applied these expanded requirements to dredging, pier construction, discharge pipes and water diversion structures located outshore of the low-water line within the Twelve-Mile Circle. (*See* Reading Aff. ¶¶ 9-13, App. 58a-60a; Sickels Aff. ¶¶ 7-9, App. 63a-64a; Broderick Aff. ¶¶ 11-16, App. 70a-72a.)

C. *New Jersey v. Delaware II.*

Although the 1905 Compact resolved many issues, the boundary line remained undetermined. In 1925 and 1926, a dispute over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle rekindled the controversy. (Record, No. 11, Orig., Pl. Ex. 107, 108.) The parties were again unable to resolve the dispute (which had been left open by Article VI of the Compact of 1905), (*id.*, Pl. Ex. 5), and this Court granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle ("*New Jersey v. Delaware II*"). *See* 279 U.S. 825 (1929). The Court appointed a Special Master, who submitted his report on October 9, 1933. 55 S.Ct. 934 (1933). Both States filed exceptions.

On February 5, 1934, the Court confirmed the Special Master's report. 291 U.S. at 385. Within the Twelve-Mile Circle, the Court set the boundary line at the mean low-water line on the New Jersey shore, "subject to the Compact of 1905." *Id.* South of the Twelve-Mile Circle, the Court set the line at the middle of the main shipping channel.

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[5] "Reading Aff.," "Sickels Aff.," and "Broderick Aff." refer to the Affidavits of Jeffrey T. Reading, Frederick Sickels, and Kevin Broderick in Support of Motion To Reopen And For A Supplemental Decree, found respectively at App. 55a, 61a, and 66a.

Id. The Decree provided: "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree . . . ." 295 U.S. at 698. The Decree was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." *Id.* at 699.

D. The Present Controversy.

1. Delaware's Recent Regulation of Structures on New Jersey's Shore.

In 1957 and 1958, the Delaware State Highway Department acknowledged that, under Article VII of the Compact of 1905, Delaware lacked riparian jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. (*See* Donlon Aff. ¶¶ 7-8 & Ex. C-G, App. 87a-89a, 102a-110a.)[6] Delaware at that time conceded that such improvements were subject solely to New Jersey's authority. (*Id.*) In more recent years, however, Delaware has asserted jurisdiction over such projects on the New Jersey side.

In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The DCZA declares that it is Delaware's policy "to prohibit entirely the construction of new heavy industry in its coastal

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[6] "Donlon Aff." refers to the Affidavit of Amy C. Donlon, Deputy Attorney General, State of New Jersey, in Support of Motion To Reopen And For A Supplemental Decree, found at App. 84a.

areas, which industry is determined to be incompatible with the protection of that natural environment in those areas." *Id.* § 7001. The DCZA prohibits "bulk product transfer facilities" in the coastal zone, except for those in the Port of Wilmington. *Id.* §§ 7002(f), 7003. Industrial development other than that of heavy industry requires a permit issued by the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC"). *Id.* § 7004. Persons who violate the DCZA are subject to a fine of up to $50,000 per day for each day of the violation. *Id.* § 7011.

In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the "DSLA"). The DSLA provides that "[n]o person shall deposit material upon or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department." *Id.* § 7205(a). The DSLA also provides "[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands." *Id.* § 7210. Violations of the DSLA are punishable by civil fines and criminal penalties. *Id.* § 7214.

Delaware has applied these laws to a limited number of projects on the New Jersey side of the River, and just this year actually invoked these laws to block a project on New Jersey's side.

On December 13, 1991, DNREC issued a DCZA permit to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. ("Logan"), to construct a pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey.

(*See* Donlon Aff. ¶ 26, App. 96a.) To New Jersey's knowledge, since 1991, the only other applicant for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing LLC, an affiliate of BP America, Inc., whose DCZA application was denied just this year.

In the case of Crown Landing, Delaware withheld a DCZA permit in March 2005, effectively blocking the project. (Segal Dec. ¶¶ 9-22, App. 137a-142a.)[7] Crown Landing is seeking to construct and operate a liquefied natural gas ("LNG") import terminal and re-gasification facility in Logan Township, New Jersey. (*Id.* ¶ 2, App. 133a-134a.) The LNG facility will be located entirely within New Jersey, but the project depends on an unloading pier extending into the Delaware River approximately 2,000 feet beyond the low-water mark. (*Id.* ¶ 4, App. 134a-135a.) The facility is supported by the New Jersey Board of Public Utilities as a means to increase the "vital" supply of natural gas to New Jersey. (*Id.* ¶ 8 & Ex. 4, App. 137a, 150a-151a; Fox Aff. ¶ 15, App. 82a.)[8]

Crown Landing initially applied for a DSLA permit for the pier in September 2004, but Delaware declined to issue the DSLA permit until Crown Landing first obtained a DCZA permit. (Segal Dec. ¶¶ 10-11, App. 138a.) Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. (*Id.* ¶ 14, App. 139a.) On February 3, 2005, the

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[7] "Segal Dec." refers to the Declaration of Lauren B. Segal, found at App. 133a.

[8] "Fox Aff." refers to the Affidavit of Jeanne M. Fox in Support of Motion To Reopen And For A Supplemental Decree, found at App. 78a.

Secretary determined that the LNG facility was an "offshore bulk transfer facility" as well as a "heavy industry use" specifically prohibited by the DCZA. (*Id.* ¶ 15 & Ex. 2, App. 139a, 146a-147a.) He also concluded that the "on-shore storage tanks essential to the operation of the facility," although located in New Jersey, "are prohibited structures." (App. 147a.) The Secretary explained that, "[d]espite the benefits that increased LNG imports might bring, placement of this facility within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone." (*Id.* ¶ 16 & Ex. 2, App. 139a-140a, 147a.) On March 30, 2005, the Delaware Coastal Zone Industrial Control Board affirmed the Secretary's decision. (*Id.* ¶ 17, App. 140a.) The decision has now become final. (*Id.* ¶ 19, App. 140a-141a.)

Similar to Delaware's permitting actions under the DCZA, only a few applicants have requested DSLA approvals for improvements on the New Jersey side of the River. (*See* Donlon Aff. ¶ 6, App. 86a.) DNREC issued a DSLA permit to Logan on September 30, 1991 for the pier and water intake for which Logan obtained a DCZA permit. (*Id.* ¶ 18, App. 93a.) In 1996, as part of a joint project to reestablish historical ferry service between the two States, the New Jersey Division of Parks and Forestry obtained a DNREC subaqueous lands lease for construction of a pier adjacent to Ft. Mott State Park in Salem County, New Jersey. (*Id.* ¶ 20, App. 93a-94a.)

Just this year, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to "The Riverwalk at Penns Grove," a redevelopment project in the Borough of Penns Grove, New Jersey, (*id.* ¶¶ 21-22 & Ex. M, App. 94a-95a, 131a-132a), and also issued Fenwick Commons a determination, pursuant to § 307 of the federal Coastal Zone Management Act, 16

U.S.C. § 1456 (the "FCZMA"), that its project was consistent with Delaware's coastal zone management plan (Donlon Aff. ¶ 21, App. 94a).[9] New Jersey has asserted jurisdiction over this specific structure for the last 150 years – by legislative action in 1855, by executive actions in 1916 and 1921, and by judicial actions in 1958 and in 1962. (Castagna Aff. ¶ 8(1), (12), (19), App. 31a, 36a-37a, 40a.)

Fenwick Commons notified Delaware on May 6, 2005, that "[f]inancing considerations" compelled it to obtain the Delaware permit in order to proceed with the project. (Donlon Aff. ¶ 22 & Ex. M, App. 94a-95a, 131a-132a.) But Fenwick Commons nonetheless stated: "the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey . . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m." (*Id.*)

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[9] The FCZMA was enacted in 1972 to encourage coordination and cooperation between federal, state, and local coastal zone management activities, *see* 16 U.S.C. § 1452(4),(5), but does not modify or supersede any interstate compact. 16 U.S.C. § 1456(e)(1). After the enactment of the FCZMA, New Jersey prepared its own coastal zone management plan in which it recognized potential conflicts that could arise with Delaware over regulation of projects within the Twelve-Mile Circle and the need for coordination between the States for such projects. (*See* Affidavit of Steven Whitney in Support of Motion To Reopen And For A Supplemental Decree ("Whitney Aff.") ¶¶ 2, 3, App. 73a-75a.) For a period of time, New Jersey and Delaware sought a means for resolving these potential conflicts between each State's coastal zone management policies through a formal agreement. (*See id.* ¶¶ 6, 7, App. 75a-76a.) However, New Jersey subsequently abandoned those efforts because of concerns that such an agreement would create an overly cumbersome approval process and would give Delaware effective veto power over projects on the New Jersey side of the Delaware River that met New Jersey standards. (*See id.* ¶ 8, App. 76a.)

2. New Jersey's Efforts to Resolve the Controversy.

Delaware's actions have precipitated a serious controversy between the States. New Jersey state officials have sought, without success, to persuade Delaware that its assertion of jurisdiction over improvements appurtenant to the New Jersey shoreline violates Article VII of the Compact of 1905. On April 11, 2005, following informal efforts to reach a settlement, Paul T. Fader, Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, formally advised his Delaware counterpart, Joseph C. Schoell, Legal Counsel to Delaware Governor Ruth Ann Minner, that, under the Compact of 1905, "Delaware does not have jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline." (App. 17a-18a.) New Jersey cited the plain language of Article VII, this Court's holding in 1934 that the boundary determination was "subject to the Compact of 1905," and this Court's recent opinion in *Virginia v. Maryland*, 540 U.S. 56 (2003), deciding a similar issue under the 1785 Compact between Virginia and Maryland. (App. 17a-20a.) Delaware responded on May 9, 2005, arguing that the Compact of 1905 limited New Jersey's riparian jurisdiction solely to New Jersey's territory above the low-water mark on the New Jersey shore. (App. 21a-24a.)

The New Jersey Legislature has likewise protested Delaware's exercise of permitting authority over structures appurtenant to the New Jersey shoreline. On May 16, 2005, the New Jersey State Assembly unanimously adopted a resolution urging the Governor and General Assembly of Delaware to amend the DCZA to make clear that it "does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact." (App.

155a-158a.) A nearly identical resolution is pending in the New Jersey Senate. (App. 159a-164a.)

Concerned that Delaware's continued assertion of regulatory authority "effectively restricts industrial development and significantly chills other development on the New Jersey shoreline within the twelve-mile circle of New Castle, Delaware," thirty-one New Jersey legislators recently introduced a bill requiring that New Jersey state pension funds be withdrawn from Delaware banks unless Delaware conforms its permitting laws to respect New Jersey's rights under the 1905 Compact. (App. 261a-265a.) Two Delaware legislators subsequently introduced legislation authorizing the Governor to call on the National Guard of Delaware to remove any "encroachments" upon Delaware's boundary. (App. 266a-268a.)[10]

LEGAL ARGUMENT

I.

THE COURT SHOULD EXERCISE ITS CONTINUING ORIGINAL JURISDICTION TO ENFORCE THE 1905 COMPACT.

Article III, Section 2, Clause 2 of the Constitution of the United States grants original jurisdiction to the Supreme Court "[i]n all Cases . . . in which a State shall be Party . . . ." Congress has additionally provided that this Court "shall have original and exclusive jurisdiction of all controversies

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[10] Conceivably, this bill would authorize Delaware's National Guard to remove any structure outshore of New Jersey's low-water mark, including any historic pier that long ago received approval from New Jersey but which Delaware has not previously attempted to regulate.

between two or more States." 28 U.S.C. § 1251(a). An exercise of this Court's original jurisdiction is necessary here in order to enforce New Jersey's rights under Article VII of the 1905 Compact, which were specifically preserved by this Court in the 1935 Decree.

As noted above, although the Court in 1934 established the boundary within the Twelve-Mile Circle at the low-water mark on the New Jersey side, that ruling was "subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385. The Decree issued by the Court in 1935 provided: "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree . . . ." 295 U.S. at 698. The Decree also provided that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." *Id.* at 699. The Court "retain(ed) jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree . . . ." *Id.* at 698.

Since Delaware has now made it clear that it will not respect New Jersey's exercise of riparian jurisdiction over structures appurtenant to the New Jersey side of the River within the Twelve-Mile Circle, it is appropriate to reopen *New Jersey v. Delaware II* to confirm that the 1935 Decree protects New Jersey's rights under the Compact.

In *Mississippi v. Louisiana*, 506 U.S. 73 (1992), the Court identified two factors to be considered in determining whether to exercise its original jurisdiction. *Id.* at 77. First,

the Court must consider the interests of the complaining state, focusing on the "seriousness and dignity" of the claim. *Id.* (internal quotation marks omitted). Second, the Court must consider whether there is an alternative forum in which the issues tendered can be fully resolved. *Id.* It is not clear to what extent this traditional two-factor test for exercising original jurisdiction applies when, as in this case, the Court has retained continuing jurisdiction pursuant to an earlier decree.[11] Nevertheless, even if that two-factor test is applicable here, this controversy warrants the Court's exercise of original jurisdiction.

First, the matters in controversy are grave and important. This case will decide whether New Jersey can exercise its sovereign right to regulate the riparian rights of its own citizens along its own shoreline within the Twelve-Mile Circle, free of regulation by Delaware, and whether Delaware can interfere with New Jersey's control of growth and development in this area. The answer depends on this Court's interpretation of the 1905 Compact that settled the States' litigation in *New Jersey v. Delaware I*, and that was specifically preserved in this Court's opinion and decree in *New Jersey v. Delaware II*. The "seriousness and dignity" requirement is clearly met here. Indeed, the Court recently asserted original jurisdiction over a very similar dispute between Virginia and Maryland, concluding that Virginia alone had the right to regulate the riparian rights of its own citizens in the Potomac River under the Compact of 1785, notwithstanding that waterfront projects in Virginia extended

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[11] The Court included a similar continuing jurisdiction provision in its decree in *Nebraska v. Wyoming*, 325 U.S. 589, 671-72 (1945) (No. 6, Orig.). Over forty years later, Nebraska filed a Motion for Leave to File a Petition for an Order Enforcing Decree and for Injunctive Relief. The Court granted Nebraska's motion and docketed the case as No. 108, Original. 479 U.S. 1051 (1987).

across the boundary line into Maryland. *Virginia v. Maryland*, 540 U.S. at 71-72.[12]

Second, no alternative forum exists where the Compact question can be resolved. So far in 2005, Delaware has twice asserted jurisdiction over two major developments within New Jersey's riparian jurisdiction – Crown Landing's LNG project and Fenwick Commons' Riverwalk. Delaware barred construction of the Crown Landing facility, and that action has become final. (Segal Dec. ¶ 19, App. 140a-141a.) By contrast, Delaware approved the Riverwalk project even though Fenwick Commons reserved its objection to Delaware's assertion of authority. (Donlon Aff. ¶¶ 21-22 & Ex. M, App. 94a-95a, 131a-132a.) Neither landowner is currently litigating Delaware's claimed authority. Accordingly, just as in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), "no pending action exists to which [this Court] could defer adjudication on this issue." *Id.* at 452.

Even if Delaware provided a venue in which private entities could challenge Delaware's assertion of riparian jurisdiction, New Jersey's sovereign interests would not be directly represented. More importantly, a Delaware venue clearly would not provide New Jersey an adequate forum in which to seek redress for Delaware's challenge to its sovereignty. As this Court has recognized, "[i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally

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[12] The Court's decision to resolve this controversy will defuse the increasing tensions between the States illustrated by recent bills introduced in both States' legislatures. *See supra* at 16-17. This escalating dispute presents the "model case" for the Court's original jurisdiction, without which the controversy "would amount to *casus belli* if the States were fully sovereign." *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks omitted); *see also Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991).

nullified, or given final meaning by an organ of one of the contracting States." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). The ability to invoke the jurisdiction of the Supreme Court to enforce an interstate compact represents an important element of a State's willingness to enter such agreements, since it is difficult to conceive why a state would enter a compact if it had to seek redress for violations in the courts of the other state. *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

In addition to the two factors identified by the Court in *Mississippi v. Louisiana*, the Court has generally limited its exercise of original jurisdiction to matters which constitute a justiciable case or controversy within the meaning of the Constitution. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). This requires a determination that a state has suffered an apparent wrong by another state's actions which furnishes grounds for judicial redress, or that it asserts a judicially enforceable right under accepted principles of common law or equity. *Id.* To the extent that this requirement applies when the Court has retained jurisdiction of a prior dispute, New Jersey is asserting an injury to an enforceable right based on Delaware's assertion of jurisdiction over riparian development on the New Jersey shore, in violation of the 1905 Compact. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991) (a compact not only has the force of federal law, but constitutes a contract between the participating states).

Moreover, Delaware's assertion of jurisdiction clearly presents a justiciable case or controversy. Delaware's rejection of the Crown Landing project and its actions regarding the Riverwalk project are a direct affront to New Jersey's right to act in the interests of its citizens to regulate growth and development along its own shoreline. Delaware's interference could discourage development

applications in this area of New Jersey's shoreline by requiring approval from two separate States. (Castagna Aff. ¶ 12, App. 52a.) Further, reduced riparian development could in the long term reduce the income realized by the New Jersey School Fund, the beneficiary of money received from riparian grants. (*Id.* ¶ 13, App. 52a.) Delaware's actions also affect the property rights held by the State of New Jersey itself, since New Jersey could be required to seek regulatory approvals from Delaware to develop public lands that it owns within the Twelve-Mile Circle. (*Id.* ¶ 11, App. 52a.) Arguably, Delaware's assertion of jurisdiction could subject New Jersey employees to criminal penalties for taking soil samples on the New Jersey side of the Delaware River if this were done without obtaining a permit from Delaware. *See* Del. Code Ann. tit. 7, §§ 7205, 7214 (2005). (*See also* Segal Dec. ¶ 10, App. 138a.)

In short, Delaware's assertion of riparian jurisdiction in violation of the 1905 Compact presents a clear case or controversy requiring resolution by the only tribunal authorized to interpret the Compact in a manner binding on both States. New Jersey has properly invoked this Court's original jurisdiction.

II.

THE COURT SHOULD ENJOIN DELAWARE FROM FURTHER VIOLATIONS OF THE 1905 COMPACT.

Delaware has made clear that it will not respect New Jersey's exercise of exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline within the Twelve-Mile Circle, as reserved by the Compact. Accordingly, this Court should reopen *New Jersey v. Delaware II* and issue a supplemental decree to confirm New

Jersey's rights under the 1905 Compact and to enjoin Delaware from further interfering with those rights.

A compact is "a contract .... It remains a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). In addition, "congressional consent 'transforms an interstate compact . . . into a law of the United States' . . . ." *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). "Once a compact between States has been approved [by Congress], 'it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had never been contested.'" *New Jersey v. New York*, 523 U.S. at 810 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 727 (1838)). "Just as if a court were addressing a federal statute, then, the 'first and last order of business' of a court addressing an approved interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 567-68); *Virginia v. Maryland*, 540 U.S. at 66.

"Accordingly, where the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory States." *Oklahoma v. New Mexico*, 501 U.S. at 245 (Rehnquist, C.J., concurring in part and dissenting in part). In this case, interpretation of the 1905 Compact presents a clear issue of law that should be decided in favor of New Jersey.

A. The Plain and Unambiguous Language of the Compact of 1905 Confirms that New Jersey Retained Riparian Jurisdiction Over Structures Extending Below the Low-Water Mark on the New Jersey Shore, Free From Regulation by Delaware.

Article VII of the 1905 Compact provides:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). (App. 5a.)

The use of the phrase "riparian jurisdiction" connotes State sovereignty over riparian improvements. "Riparian" derives from the Latin word "ripa," meaning "shore of the river," and is defined as "[o]f or pertaining to the bank of a river; as, riparian rights." Webster's Unabridged Dictionary 1244 (1898). And "jurisdiction," as used in Article VII, refers to the "authority of a sovereign power to govern or legislate." *Id.* at 806. Thus, the term "riparian jurisdiction" clearly refers to each State's sovereign authority to regulate activities on its own shores of the Delaware River.

At the time of the 1905 Compact, "riparian jurisdiction" also was clearly understood in both States to encompass the regulation of improvements extending outshore of the low-water mark. It has long been recognized that a primary objective of riparian improvements is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters.

See Mayor of Newark v. Sayre, 45 A. 985, 990 (N.J. 1900). Delaware has similarly recognized that "[a]mong the riparian property rights associated with ownership of the foreshore is the right to wharf out directly from the foreshore to the bulkhead line and the right to have free access to the navigable portion of a river." *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1168 (Del. 1992) (citing *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 456-57 (Del. Ch. 1882)). And, as this Court recognized in *New Jersey v. Delaware II*, "riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers . . . ." 291 U.S. at 375.

Article VII of the 1905 Compact makes clear that such jurisdiction is to be interpreted broadly. It is jurisdiction "of every kind and nature." Moreover, Article VII specifically confirmed that each State would be able to exercise its riparian jurisdiction exclusive of the other's. Each State would be able to exercise its authority "on its own side of the river" pursuant to "the laws of the respective States." This means that each State's exercise of its riparian jurisdiction would not be interfered with by the other State.

The use of the term "continue" is also of critical importance because it shows that the States intended that their riparian sovereignty could carry on in the same manner as had been exercised in the past. Before the Compact was enacted, New Jersey had exercised riparian jurisdiction over the construction of docks, wharves, piers, and other waterfront developments, pursuant to statutes that applied to all of the State's waterfront, including within the Twelve-Mile Circle. *See, e.g.*, 1851 N.J. Laws 335; N.J. Stat. Ann. § 12:3-10, -12, -21.[13] Further, it was well established before

[13] This included dredging to reach the navigable channel. *See* N.J. Stat. Ann. § 12:3-21 (1979) (enacted in 1891).

the 1905 Compact that the right to build riparian improvements was subject to state regulation. *E.g., Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 64-65 (1873) (riparian proprietor may construct wharves or piers "subject to such general rules and regulations as the legislature may prescribe for the protection of the public").

On at least eight occasions prior to 1905, New Jersey had issued grants for riparian lands and structures extending well below the low-water mark on the New Jersey side within the Twelve-Mile Circle. (*See* Castagna Aff. ¶ 8, App. 29a, 31a-36a, 54a.) As part of this grant process, New Jersey imposed appropriate regulatory conditions on those conveyances, such as prohibiting "the extension of such docks or wharves so far into said river as to injure or impede the navigation of the same." *E.g.*, 1854 N.J. Laws ch. 143, § 1; 1855 N.J. Laws ch. 109, § 4 (same); 1871 N.J. Laws ch. 307, § 1 ("provided, however, that no such wharf, pier or bulkhead shall be erected or built . . . for a greater distance than one hundred feet beyond low water mark, nor in front of the land of any other person"). Thus, when the Compact of 1905 provided that the States would "continue" to exercise "riparian jurisdiction of every kind and nature" under the "laws of the respective states," it confirmed that New Jersey would continue to exercise riparian jurisdiction in the same manner to which it had been historically accustomed: free of regulation or interference by Delaware.

Other provisions of the Compact reinforce this conclusion. Articles I and II limit the States from asserting jurisdiction over wharves or docks attached to the other State by prohibiting the service of process by one State aboard a vessel attached to a pier or wharf on the banks of the other. This language recognizes a unique status for such riparian structures under the Compact and underscores the intent of the drafters to ensure that wharves and piers were subject

solely to the jurisdiction of the State to whose riverbank they were attached. Similarly, Article IV called for the enactment of concurrent fishing laws, and Article V provided for each State's fishing laws to continue in effect until such concurrent laws were passed. Just as in *Virginia v. Maryland*, "the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." 540 U.S. at 67. If the drafters of Article VII had intended for Delaware to have either exclusive or concurrent authority to regulate New Jersey's riparian improvements, they would have said so.

B. Delaware's Previous Admissions and the Parties' Construction of the Compact Demonstrate New Jersey's Right to Regulate Riparian Users On Its Own Side of the River, Free From Regulation by Delaware.

The actions by both New Jersey and Delaware since the 1905 Compact confirm that New Jersey retained exclusive riparian jurisdiction on its own side of the Delaware River, free from regulation by Delaware.

1. Delaware's Concessions in *New Jersey v. Delaware II* Confirm that New Jersey Has Exclusive State Riparian Jurisdiction.

The 1905 Compact was at issue in *New Jersey v Delaware II*. New Jersey argued that the long history of riparian improvements by New Jersey citizens established New Jersey's ownership in parts of the Delaware riverbed outshore of the mean low-water line within the Twelve-Mile Circle, and that the 1905 Compact confirmed this ownership. (App. 171a-175a.) While disputing New Jersey's claims of ownership, Delaware conceded both the right of New Jersey citizens to wharf out to navigable water and the exclusive

right of New Jersey to regulate the exercise of those riparian rights.

In its Reply Brief to the Special Master, Delaware clearly conceded that New Jersey enjoyed exclusive regulatory jurisdiction over its riparian lands, stating: "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey *and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights*." (App. 186a (emphasis added).) Delaware further conceded New Jersey's exclusive regulatory authority over such rights in its oral argument before the Special Master:

> We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded* to the State of New Jersey *all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do.* (App. 191a (emphasis added).)

The Special Master accepted Delaware's concessions. He concluded that Delaware's "dominion and jurisdiction" in the River was "*modified* by the compact of 1905 between the States of Delaware and New Jersey." (App. 255a (emphasis added).) "Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary . . . must so provide." (App. 249a.)

On numerous other occasions before this Court, Delaware conceded that the 1905 Compact protected riparian

rights on the New Jersey side of the Delaware River. (*E.g.*, App. 215a ("[T]he State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned because it is clearly protected by the Compact of 1905 between the States."); App. 235a ("The effect of Article VII of the Compact . . . was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.") (emphasis in original).)

Indeed, Delaware *reassured* the Court that setting the boundary on the New Jersey side within the Twelve-Mile Circle would not interfere with New Jersey's riparian improvements because the 1905 Compact prevented such interference:

> Much is said by the Plaintiff . . . of the great value of these wharf rights on the New Jersey side. The implication in the brief is that if the boundary line between the States is determined to be low-water mark on the New Jersey shore the interests of the riparian owners will be either destroyed or seriously prejudiced. *This, of course, is simply not the fact. The Compact of 1905 above referred to recognized the rights of riparian owners in the river to wharf out, and the Master so found.* (App. 223a (emphasis added).)

And when New Jersey argued (albeit unsuccessfully) that the 1905 Compact already had set the boundary in the middle of the river by giving New Jersey the right to grant riparian

lands below the low-water mark, Delaware responded as follows:

> Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. (App. 237a (emphasis in original).)

In short, Delaware conceded that the 1905 Compact both protected the right of New Jersey citizens to wharf out to navigable water and ceded to New Jersey the jurisdiction to regulate the exercise of such rights.

2. The Plain and Unambiguous Language of the 1905 Compact is Reinforced by the States' Construction of the Compact.

The contemporaneous construction by New Jersey and Delaware of each State's riparian jurisdiction under the 1905 Compact confirms that New Jersey retained exclusive riparian jurisdiction on its side of the Delaware River.

Following the enactment of the 1905 Compact, New Jersey continued to exercise its riparian jurisdiction over activities on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Since 1905, New Jersey has issued at least thirty-three riparian grants extending below low-water within the Twelve-Mile Circle. (Castagna Aff. ¶ 8, App. 29a, 36a-51a, 54a.) In addition, New Jersey has exercised its riparian jurisdiction by applying regulatory and permitting requirements to various improvements and activities outshore of the low-water line in the Twelve-Mile

Circle, including dredging, pier construction, stormwater and wastewater discharge pipes, and water diversion. (*See* Reading Aff. ¶¶ 9-13, App. 58a-60a; Sickels Aff. ¶¶ 7-9, App. 63a-64a; Broderick Aff. ¶¶ 11-16, App. 70a-72a.)

In addition, New Jersey's courts, beginning nearly 50 years ago, affirmed New Jersey's right under the 1905 Compact to regulate activities occurring on riparian structures and to tax the value of such improvements, notwithstanding the 1934 boundary decision. *See New Jersey v. Federanko*, 139 A.2d 30, 36-37 (N.J. 1958) (affirming conviction for gambling that occurred on the Pennsgrove Pier);[14] *Main Assocs. Inc. v. B&R Enters., Inc.*, 181 A.2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962) (upholding authority of Borough of Penns Grove to tax the value of the pier).

Thus, New Jersey's "contemporaneous reading" of the 1905 Compact and conduct following its enactment confirm that Article VII protected New Jersey's right to regulate riparian uses on its side of the River within the Twelve-Mile Circle, free from regulation by Delaware. *See Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 466 (1986) ("The agencies' contemporaneous reading of the statute lends strong support to our interpretation.").

Over the same period, Delaware's construction of the 1905 Compact "has been neither contemporaneous with its enactment nor consistent since the statute came into law." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). In 1957, Delaware ceased an attempt to assert authority over a

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[14] In *Federanko*, Delaware submitted a brief adopting New Jersey's position that the 1905 Compact remained in effect after this Court's decision in *New Jersey v. Delaware II*. 139 A.2d at 33.

private outflow pipe on the New Jersey side of the River when the private landowner – E.I. DuPont de Numours & Co. ("DuPont") – protested that Delaware lacked jurisdiction under the 1905 Compact. (*See* Donlon Aff. ¶¶ 7-8 & Ex. C-G, App. 87a-89a, 102a-110a.) Indeed, the Delaware State Highway Department's legal counsel advised that Delaware had no jurisdiction over improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle:

> I concur in [DuPont's] opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933 [sic], the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle. (*Id.* ¶ 8(b) & Ex. E, App. 88a, 107a.)

Acting on that advice, the Delaware State Highway Department adopted a resolution on December 17, 1957, affirming that the Department "has no jurisdiction" over projects on the New Jersey side of the River within the Twelve-Mile Circle. (*Id.* ¶ 8(c) & Ex. G, App. 88a-89a, 109a-110a.) Delaware notified the United States Army Corps of Engineers accordingly by letter dated December 13, 1957. (*Id.* ¶ 8(d) & Ex. F, App. 89a, 108a.)

DuPont renewed its protests of Delaware's riparian jurisdiction in 1971, when Delaware sought to charge lease fees to DuPont for the construction of a bulkhead, pier, and fuel oil storage tank appurtenant to the New Jersey shoreline on riparian land previously granted to DuPont by the State of

New Jersey. (*Id.* ¶¶ 9-11 & Ex. H-J, App. 89a-91a, 111a-125a.) In the face of DuPont's invocation of the Compact, Delaware agreed to defer requiring any lease payments until such time as a federal court of competent jurisdiction resolved whether DuPont held superior title to Delaware. (*Id.* ¶ 11 & Ex. J, App. 91a, 121a.) The issue arose again in 1981, at which time DuPont again protested Delaware's jurisdiction based on the 1905 Compact and declined to make lease payments. (*Id.* ¶ 13 & Ex. L, App. 91a-92a, 128a-130a.) Although New Jersey has not been a party to that continuing controversy, it appears that the lease dispute remains unresolved.

Notwithstanding Delaware's enactment of the DCZA in 1971 and the DSLA in 1986, Delaware has issued permits to only a limited number of users on the New Jersey side, and it did not actually block a project until 2005. *See supra* at 11-15. Thus, the States' construction of the 1905 Compact reinforces the conclusion that the Compact protects New Jersey's right to regulate riparian uses on its side of the River within the Twelve-Mile Circle, free from regulation by Delaware.

III.

IT IS UNNECESSARY TO APPOINT A SPECIAL MASTER.

The Court should decide this case without appointing a special master. This controversy requires simply a legal ruling on the proper construction of the Compact of 1905. This ruling need only recognize that Article VII of the Compact unambiguously gives New Jersey exclusive authority over riparian improvements on its side of the River, as Delaware conceded here in the 1930s. Further, this Court

recently decided a similar legal issue in *Virginia v. Maryland*, 540 U.S. 56, so the legal guideposts are clear. Accordingly, the Court can and should decide this case without appointing a special master. *See, e.g., California ex rel. State Lands Comm'r v. United States*, 457 U.S. 273, 278 (1982) (No. 89, Orig.) ("No essential facts being in dispute, a special master was not appointed and the case was briefed and argued."); *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001) (No. 130, Orig.) (deciding case without appointing a special master by applying judicial estoppel based on New Hampshire's position in the 1970s in No. 64, Orig.).

One last procedural issue warrants comment. As stated above, New Jersey believes it has proceeded properly by filing a motion to reopen in order to seek a supplemental decree pursuant to the Court's continuing jurisdiction retained in paragraph 5 of the 1935 Decree. However, if the Court were to determine that New Jersey instead should have filed a new Bill of Complaint, then New Jersey respectfully requests that the Court treat the Petition for Supplemental Decree as New Jersey's Bill of Complaint and allow New Jersey to proceed on the basis of the papers filed here.

CONCLUSION

New Jersey requests that the Court grant it leave to reopen No. 11, Original, to seek a supplemental decree. New Jersey's proposed Supplemental Decree is found at App. 269a.

The Court should direct Delaware to file its brief in opposition to New Jersey's petition for a supplemental decree, allow New Jersey to file a reply, and set the case for argument in the October 2005 Term.

The Court should then declare that Article VII of the Compact of 1905 grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware, and the Court should enjoin Delaware from interfering with the exercise of New Jersey's riparian jurisdiction.

Respectfully submitted,

PETER C. HARVEY
Attorney General

RACHEL J. HOROWITZ*
Deputy Attorney General

Of Counsel
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Assistant Attorney General
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July 28, 2005

APPENDIX

APPENDIX 1 — THE COMPACT OF 1905, ACT OF JANUARY 24, 1907, CH. 394, 34 STAT. 858 (1907)

CHAP. 394.—An Act Giving the consent of Congress to an agreement or compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States.

Whereas commissioners duly appointed on the part of the State of New Jersey and commissioners duly appointed on the part of the State of Delaware, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States, have executed certain articles, which are contained in the words following, namely:

"First. Whereas a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom; and

"Whereas there is now pending in the Supreme Court of the United States a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upward; and

Appendix 1

"Whereas for the purpose of adjusting the differences between the said two States arising out of said conflict of jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker have been appointed commissioners on the part of the State of New Jersey by joint resolution of the legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward, and George H. Bates have been appointed commissioners on the part of the State of Delaware by joint resolution of the general assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay: Now therefore,

"The said State of New Jersey, by its commissioners above named, and the said State of Delaware, by its commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

"ARTICLE I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the

laws thereof, may he served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

"ART. II. Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on hoard a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

"ART. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river

between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

"ART. IV. Immediately upon the execution hereof the legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said commissioners for each State, respectively, shall, within two years from the date of their appointment, report to the legislature of each of said States the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended, or repealed by concurrent legislation of the said two States. Said commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

Appendix 1

"The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective legislatures thereof.

"Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

"ART. V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.

"ART. VI. Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

"ART. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

"ART. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

Appendix 1

"ART. IX. This agreement shall be executed by the said commissioners when authorized to do so by the legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued without costs to either party and without prejudice. Pending the ratification hereof by Congress said suit shall remain in statu quo.

"Done in two parts (one of which is retained by the commissioners of Delaware, to be delivered to the governor of that State, and the other one of which is retained by the commissioners of New Jersey, to be delivered to the governor of that State) this twenty-first day of March, in the year of our Lord one thousand nine hundred and five."

EDWARD C. STOKES,	PRESTON LEA,
ROBERT H. MCCARTER,	ROBERT H. RICHARDS,
FRANKLIN MURPHY,	HERBERT H. WARD,
CHAUNCEY G. PARKER,	GEO. H. BATES.

And whereas the said agreement has been confirmed by the legislatures of the said States of New Jersey and Delaware, respectively: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement and to each and every part and

article thereof: *Provided,* That nothing therein contained shall be construed to impair or in any manner affect any right or jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Approved, January 24, 1907.

APPENDIX 2 — DECREE, *STATE OF NEW JERSEY v. STATE OF DELAWARE*, ORIGINAL NO. 11, JUNE 3, 1935

Decree

NEW JERSEY *v.* DELAWARE.

No. 11, original.

Decided February 5, 1934 (291 U.S. 361) -
Decree entered June 3, 1935.

DECREE

This cause came on to be heard upon the pleadings, evidence, and the exceptions filed by the parties to the report of the Special Master, and was argued by counsel. The Court now being fully advised in the premises and for the purpose of carrying into effect the conclusions set forth in the opinion of this Court, announced February 5, 1934 (291 U.S. 361);

It is now ORDERED, ADJUDGED, AND DECREED as follows:

1. The report of the Special Master filed in this cause is hereby approved, and all exceptions thereto are hereby overruled.

2. Within the twelve mile circle (that is, within the circle the radius of which is twelve miles, and the center of which is the building used prior to 1881 as the courthouse at

Appendix 2

New Castle, Delaware, certain arcs of which are hereafter described and determined), the Delaware River and the subaqueous soil thereof up to mean low water line on the easterly or New Jersey side is adjudged to belong to the State of Delaware, and the true boundary line between the States within said twelve mile circle is adjudged to be mean low water mark on the easterly or New Jersey side of the Delaware River.

3. Below said twelve mile circle the true boundary line between the states of New Jersey and Delaware is adjudged to be the middle of the main ship channel in Delaware River and Bay.

4. The real, certain, and true boundary line separating the States of New Jersey and Delaware, in Delaware River and Bay thus determined is shown upon the annexed composite map, made up of parts of charts Nos. 294 and 295 (published in September, 1933), and No. 1218 (published in August, 1932), of the United States Coast and Geodetic Survey, embracing the particular locality; said composite map is identified by title and date as follows:

"Map of New Jersey—Delaware Boundary in
Delaware River and Delaware Bay
To Accompany
The Decree of the Supreme Court of the United States
Being a composite map combining and reducing U.S.C. &
G.S. Charts 294, 295 (Sept. 1933) and 1218 (Aug. 1932)
to show boundary between New Jersey and Delaware

settled by the final decree of the Supreme Court of the United States—pursuant to the opinion of the Court reported in 291 U.S. 361.

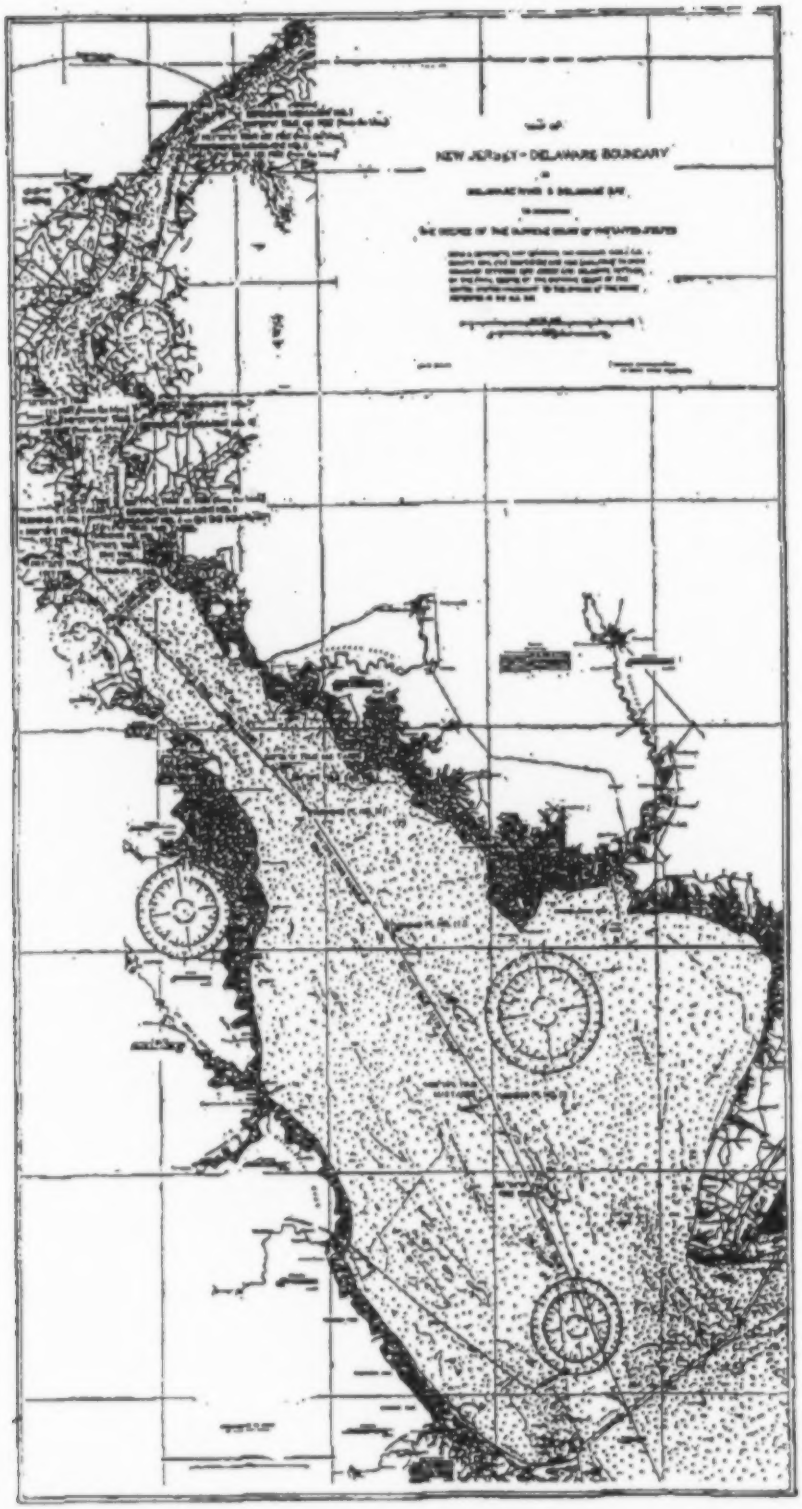
(Scale)

March 30, 1935

Sherman & Sleeper, Engineers
501 Cooper Street, Camden, N. J."

Appendix 2

[FOLD OUT]



Appendix 2

Said boundary line is described as follows:

BEGINNING at a point in the middle of the main ship channel of the Delaware River in the extension southeastward of the Eastern Arc of the Compound Curve of the boundary between Delaware and Pennsylvania, as surveyed by W.C. Hodgkins of the United States Coast and Geodetic Survey and set forth in Appendix No. 8 of the Survey Report for 1893; said point being a corner between Pennsylvania and New Jersey.

Thence (1) southeastward along said arc extended to the mean low water line on the eastern bank of the Delaware River, which point is N. 49° 50' W. True, 460 feet from Boundary Reference Monument No. 1 the position of which is Lat. 39° 47' 43.211", Long. 75° 24' 16.047".

Thence (2) along the mean low water line of the eastern bank of the Delaware River the several courses and distances thereof, the general direction being southwestward, crossing in a straight line the mouth of each intervening small estuary, to a point on the end of the spit extending southwestward from the fast land of Oldman's Neck, on the northwestern side of the mouth of Oldman's Creek; said point is located N. 51° 38' W. True, 637 feet from Boundary Reference Monument No. 2 the position of which is Lat 39° 46' 23.552", Long. 75° 26' 49.560".

Thence (3) southwestward in a straight line across the mouth of Oldman's Creek to a point on the mean low water line located N. 51° 38' W. True, 183 feet from Boundary Reference Monument No. 2.

Appendix 2

Thence (4) along the mean low water line of the eastern bank of the Delaware River, the several courses and distances thereof, the general direction being first southwestward, then southeastward, crossing in a straight line the mouth of each intervening small estuary, to a point located S. 3° 57' 55" E. True, 116 feet from Boundary Reference Monument No. 3 (which monument is United States Coast and Geodetic Survey Triangulation Station SALEM COVE NORTH) the position of which is Lat. 39° 34' 40.915", Long. 75° 30' 46.942".

Thence (5) southward in a straight line across the mouth of the Salem river to a point on the mean low water line of the eastern bank of the Delaware river located N. 3° 57' 53" W. True, 108 feet from Boundary Reference Monument No. 4 (which monument is United States Coast and Geodetic Survey Triangulation Station SALEM COVE SOUTH) the position of which is Lat. 39° 34' 03.753", Long. 75° 30' 43.614".

Thence (6) along the mean low water line of the eastern bank of the Delaware River, the several courses and distances thereof, the general direction being first, southwestward, second, southeastward, and, lastly, southward, crossing in a straight line the mouth of each intervening small estuary, to a point located S. 80° 19' W. True, 55 feet from Boundary Reference Monument No. 5 the position of which is Lat. 39° 29' 52.718", Long. 75° 31' 41.555".

Thence (7) westward along the arc of a circle, the radius of which is 18,216.16 meters or 59,764.2 feet and the center of which is the building used prior to 1881 as the County

Appendix 2

Courthouse at New Castle, Delaware, across Artificial Island, passing through Boundary Monument No. 6 on Artificial Island the position of which is Lat. 39° 29' 47.255", Long. 75° 32' 33.640"; and continuing westward along the same arc extended to Turning Point No. 7 in the middle of the main ship channel of the Delaware River said Turning Point No. 7 being located S. 86° 30' W. True, 1,567 yards from said Boundary Monument No. 6.

Thence (8) in a straight line S. 15° 11' W. True, 1,603 yards to Turning Point No. 8 located N. 89° 07' E. True, 997 yards from Reedy Island Jetty Middle Light.

Thence (9) in a straight line S. 4° 56' E. True, 3,341 yards to Turning Point No. 9 located N. 51° 33' E. True, 1,937 yards from Reedy Island Front Range Light.

Thence (10) in a straight line S. 42° 01' E. True, 30,208 yards going from the Delaware River into Delaware Bay, and passing through a point located S. 48° 06' W. True, 668 yards from Ship John Shoal Light, to Turning Point No. 10 located S. 34° 24' E. True, 5,106 yards from Ship John Shoal Light and in a straight line between Ship John Shoal Light and Elbow of Cross Ledge Light.

Thence (11) in a straight line S. 34° 22' E. True, 12,995 yards to Elbow of Cross Ledge Light, being Turning Point No. 11.

Thence (12) in a straight line S. 31° 44' E. True, along a straight line between Elbow of Cross Ledge Light and Brandywine Shoal Light, 18,124 yards to Turning Point

No. 12 located N. 58° 16' E. True 1,612 yards from Fourteen Foot Bank Light.

Thence (13) in a straight line S. 24° 06' E. True, be the distance more or less, through Delaware Bay and seaward to the limits of the respective states of New Jersey and Delaware in the Atlantic Ocean, said course passing through a point located S. 65° 54' W. True, 1,303 yards from Brandywine Shoal Light.

In the foregoing description the courses or bearings refer to the true meridian passing through the beginning of each course; the positions of the monuments are given on the North American Datum 1927; the names of lights and ranges are those given in the Light Lists, Atlantic and Gulf Coasts of the United States, corrected to January 15, 1934, and published by the Bureau of Lighthouses, with the exception of Reedy Island Jetty Middle Light which was not established until about July 12, 1934; the position of the lights in 1934 is used in computing the turning points of the various courses of the boundary and as reference points for these turning points and tie lines to the courses.

5. The court retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree, and for the purpose of a resurvey of said boundary line in case of physical changes in the mean low water line within said circle, or in the middle of the main ship channel below said circle, which may, under established rules of law, alter the location of such boundary line.

6. The State of Delaware, its officers, agents, and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree; and the State of New Jersey, its officers, agents, and representatives, its citizens and all other persons are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree.

7. This decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states (*34 Stat. L. Pt. 1, Ch. 394, p. 858*).

8. The costs of this suit shall be equally divided between the parties.

APPENDIX 3 — LETTER OF PAUL T. FADER, CHIEF COUNSEL TO ACTING GOVERNOR OF NEW JERSEY, RICHARD J. CODEY, TO JOSEPH SCHOELL, LEGAL COUNSEL TO GOVERNOR OF DELAWARE, RUTH ANN MINNER, DATED APRIL 11, 2005

STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
PO Box 001
TRENTON NJ 08625-0001

RICHARD J. CODEY
Acting Governor

PAUL T. FADER
Chief Counsel

April 11, 2005

Joseph Schoell, Esq.
Legal Counsel to the Governor
Office of the Governor
820 North French Street, 12th Floor
Wilmington, Delaware 19801

Dear Mr. Schoell:

I am writing as a follow up to our meeting on March 29, 2005 in which we discussed the application of Crown Landing LLC ("Crown Landing") before the Delaware Department of Natural Resource and Environmental Control ("DNREC"). As I explained to you in our meeting and in a prior telephone call in early March, it is the position of the State of New Jersey that pursuant to the 1905 Compact between New Jersey and Delaware, Delaware does not have

jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline.

On February 3, 2005 DNREC rendered a decision denying the application of Crown Landing to build a 2,000-foot pier on the Delaware River in Logan Township, Gloucester County, New Jersey. The pier is a key component of a proposed Liquefied Natural Gas ("LNG") import facility and regasification plant in Logan Township. This project will bring significant energy, environmental and economic benefits to the New Jersey—Delaware Region.

In rendering its decision, DNREC relied on the provisions of the Delaware Coastal Zone Act. However, I am told that DNREC never addressed the New Jersey jurisdictional issue. Subsequent to the date of our meeting, the Delaware Coastal Zone Industrial Control Board rejected an appeal by Crown Landing to overturn the DNREC decision and once again the New Jersey jurisdictional issue was not addressed.

It is evident that Delaware does not have jurisdiction over the construction of the pier or any other part of this project. Under the Interstate Compact of 1905 between New Jersey and Delaware "each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature." This includes each state's right to exert regulatory control over structures built on its own side of the river as well as tidelands ownership rights. New Jersey's riparian jurisdiction clearly applies to the pier, that is a part of the Crown Landing project.

Appendix 3

Article VII of the 1905 Compact grants New Jersey, as a State, a riparian right to use the Delaware River and to regulate use of the River from the New Jersey shore within the 12-mile circle. That right was not affected by the 1934 boundary award, as the Supreme Court specifically stated that the boundary line determination within the 12-mile circle was "subject to the Compact of 1905." *New Jersey v. Delaware*, 291 U.S. 361, 384 (1934).

Most recently, in the 2003 U.S. Supreme Court decision, *Virginia v. Maryland*, 124 S.Ct. 598, the court affirmed Virginia's rights in a similar situation. In *Virginia v. Maryland*, the Supreme Court held that the Compact of 1785 between Virginia and Maryland prohibits Maryland from attempting to regulate the use of the Potomac River by Virginia or her citizens. Even though the Virginia—Maryland boundary is on the Virginia shore of the Potomac River, the Court held that Virginia has the right to withdraw water from the Potomac and to build improvements in the river extending beyond the boundary line. The ruling was based on Article VII of the Compact of 1785. Based on this language the Supreme Court held that "Virginia, its governmental subdivisions, and its citizens may withdraw water from the Potomac River and construct improvements appurtenant to the Virginia shore of the Potomac River free of regulation by Maryland."

Our two states have always recognized the need to work together for regional solutions to common issues facing the area. Economic growth, environmental quality, and energy sufficiency are among the most important of these issues. Delaware should not think this history of cooperation may

in any way be perceived as New Jersey relinquishing any of its jurisdictional rights.

Please review the New Jersey – Delaware Compact of 1905, and particularly Article VII, under which New Jersey clearly has the right to exercise riparian jurisdiction over the proposed Crown Landing project. In addition, a review of the Maryland—Virginia compact and the U.S. Supreme Court opinion of 2003 will make it abundantly clear that Delaware is patently wrong in attempting to exert control over this project. I would hope that in view of these rights in addition to the common regional needs of New Jersey and Delaware in the important areas of economic growth, energy sufficiency, and enhanced environmental quality, Delaware would acknowledge New Jersey's proper jurisdiction. If not, New Jersey will be forced to take all appropriate action to enforce its rights. I await your prompt reply.

Very truly yours,

s/ Paul T. Fader
Paul T. Fader
Chief Counsel

cc: Governor Richard J. Codey
Attorney General Peter Harvey
Pete Cammarano, Chief of Staff

APPENDIX 4 — LETTER OF JOSEPH C. SCHOELL, LEGAL COUNSEL TO GOVERNOR OF DELAWARE, RUTH ANN MINNER, TO PAUL T. FADER, CHIEF COUNSEL TO ACTING GOVERNOR OF NEW JERSEY, RICHARD J. CODEY, DATED MAY 9, 2005

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

RUTH ANN MINNER
GOVERNOR

May 9, 2005

Paul T. Fader, Esquire
Chef Counsel
Office of the Governor
P.O. Box 001
Trenton, NJ 08625-0001

Dear Paul:

Thank you for your April 11, 2005 letter regarding the State of Delaware's authority to regulate uses within its borders and Coastal Zone. We respectfully disagree with your conclusion that Delaware lacks regulatory authority over the proposed Crown Landing project, as well as 'any project appurtenant to New Jersey's shoreline.'"

Delaware's right to regulate structures appurtenant to the shore that extend into Delaware waters and riverbed was explicitly recognized by the United States Supreme Court in *New Jersey v. Delaware*, 291 U.S. 361, 375-76 (1934). The Supreme Court considered the issue of piers built by New

Jersey "riparian proprietors" that extended onto Delaware's portion of the riverbed. It ruled that Delaware's "acquiescence" in allowing such piers comprised a "privilege or license accorded [by Delaware] to the individual owners . . . bounded by the lines of their possession." By recognizing Delaware's grant of "privilege or license" to those specific New Jersey pier-owners, the Court settled any question as to Delaware's regulatory authority or ownership of the subaqueous soil.

While Article VII of the 1905 Compact preserved for both states "riparian jurisdiction," that term does not cover structures that cross state lines. Rather, the "riparian jurisdiction" addressed in the Compact pertains only to the river banks within each state's borders. This is obvious from the language of Article VII:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make *grants, leases, and conveyances of riparian lands* and rights under the laws of the respective States.

As the reference to "grants, leases, and conveyances" shows, the jurisdiction addressed by this provision is that over "riparian lands" — i.e., shoreline within the state's boundaries — not riverbed territory. This is confirmed by the very next provision, Article VIII:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State *of, in, or over the Delaware River,* or the ownership of

> the subaqueous soil thereof, except as herein expressly set forth.

Reading these provisions together, the Compact preserved each state's jurisdiction over its own "riparian lands," but *carved out* regulatory rights "of, in, or over" the river or the ownership of subaqueous soil. Thus the Compact plainly cannot support New Jersey's claim of regulatory control over structures that cross into Delaware. Even if the Compact was ambiguous on this point, which it is not, such ambiguity was extinguished by the Supreme Court's later recognition of Delaware's authority over New Jersey piers and appurtenances *in New Jersey v. Delaware.*

In *Virginia v. Maryland,* 540 U.S. 56 (2003), the relevant documents — a 1785 Compact and an 1874 arbitration verdict — explicitly addressed the issue of cross-border improvements. Both documents expressly preserved full wharf and improvement rights for each state. The Court's ruling was founded upon a strict analysis of the "plain language" of the documents. *See id.,* 540 U.S. at 66, 69-71, 73-74. In contrast, the 1905 Compact explicitly preserved each state's right to regulate its own territory "of, in, or over the Delaware River."

We appreciate New Jersey's interest in this issue, and hope that you understand that jurisdictional issues are important to the citizens of the State of Delaware. It certainly is our hope that we will continue the spirit of cooperation that has been the hallmark of relations between our two states.

Very truly yours,

s/ Joseph C. Schoell
Joseph C. Schoell
Legal Counsel to the Governor

cc: Collins J. Seitz, Jr., Esquire
Kevin Maloney, Esquire

APPENDIX 5 — AFFIDAVIT OF RICHARD CASTAGNA, DATED JUNE 27, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF RICHARD G. CASTAGNA IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:

SS

County of Mercer:

Richard G. Castagna, being duly sworn, deposes and says:

1. I am the Supervisor of the Southern Region of the Bureau of Tidelands Management of the New Jersey Department of Environmental Protection. I have held this position since 1993. For 16 years before that, I was consecutively a Senior

Environmental Specialist, a Principal Environmental Specialist and a Supervising Environmental Specialist. I have a total of 28 years experience in identifying State tidelands claims and in assisting in the administration of the tidelands program of the State of New Jersey. The Bureau of Tidelands serves as staff to the Tidelands Resource Council in the Department of Environmental Protection of the State of New Jersey. N.J. Stat. Ann. § 13:1B-10 (1979.) The Council has been designated by the Legislature as "the public body responsible for the stewardship of the State's riparian lands." N.J. Stat. Ann. § 12:3-12.1 (Supp. 2005.) Since 1869, the Council (and its predecessors) has been the agency initially responsible for determining whether the State should make any grant, lease or conveyance of State riparian lands and rights under the laws of New Jersey.

2. The staff of the Bureau is the custodian of the records of the actions of the Council and its predecessor agencies. In preparing this Affidavit, I have reviewed those records, the laws of New Jersey concerning legislative riparian grants, portions of the record compiled in *New Jersey v. Delaware*, 291 U.S. 361 (1934) ("the 1934 proceedings"), and the response of Delaware to the Division of Law's May 2005 Freedom of Information Act request concerning Riverwalk in Penns Grove.

Riparian Rights in New Jersey in 1905 and Today

3. Riparian rights in New Jersey have been delineated by statute. Riparian owners have no constitutional riparian rights. *Stevens v. Patterson and Newark Railroad Company*,

34 N.J.L. 532, 3 Am. Rep. 269 (E. & A. 1870.) Before 1851, the State of New Jersey recognized a "local custom" of riparian owners to fill the tidally flowed lands ("tidelands") outshore of their properties. *Bell v. Gough*, 23 N.J.L. 624 (E. & A. 1852.) Starting in 1851, this common law right was circumscribed by statute to allow such filling without state permission only from the mean high water line to the mean low water line. 1851 N.J. Laws p.335. ("The Wharf Act".) This statutory riparian right to fill to the low water line was abolished in the Hudson River area in 1869, 1869 N.J. Laws ch. 383, p.1018, § 3, and was abolished elsewhere in New Jersey in 1891. 1891 N.J. Laws ch. 124, p.216, § 1, codified as N.J. Stat. Ann. § 12:3-4 (1979.) State regulation of riparian lands in New Jersey began in 1851 with the adoption of the Wharf Act. From 1851 to 1891, riparian owners in New Jersey, under the Wharf Act, could construct piers and fill outshore of low water provided they obtained the approval of their respective counties. The counties could approve such structures or fill only if there was no hazard to navigation.

4. Riparian laws in New Jersey are compiled in N.J. Stat. Ann. §§ 12:3-1 (1979), et seq., first known as The General Riparian Act of 1869. Riparian owners have a preemptive right to apply to the State of New Jersey to lease or purchase the State's tidal land in front of their upland. N.J. Stat. Ann. § 12:3-7 (enacted in 1869.) A sale or lease to one who is not an upland owner must be with the consent of the upland owner or on six month's notice to the upland owner. N.J. Stat. Ann. § 12:3-9 (enacted 1869.) Otherwise, the grant or lease will be void. *Shamberg v. Board of Riparian Commissioners*, 43 N.J.L. 132, 60 A. 43 (Sup. Ct. 1905.) Since 1916, state or local governments planning parks or

highways have not needed the upland owner's prior consent: this is the lone exception to this consent requirement. N.J. Stat. Ann. § 12:3-33 (enacted in 1916.) If a right of way, such as a street or railroad line, separates a property owner from the shoreline, that owner nevertheless has the right of an upland owner or a riparian owner to apply for a state tidelands grant or lease. N.J. Stat. Ann. § 12:3-18 (enacted 1877.) Riparian owners, once they have a grant or lease, may dredge out from the area of their grant in order to reach the navigable channel. N.J. Stat. Ann. § 12:3-21 (enacted 1891.) The exercise of this right is subject to obtaining applicable State environmental permits and a tidelands license. Riparian owners also have a common law right to accretion to their properties and suffer loss of their lands by erosion. Artificial filling of State tidelands is prohibited without permission from the State and requires a conveyance or lease of the tidelands involved. N.J. Stat. Ann. § 12:3-4 (as amended in 1891.) Unauthorized filling does not divest the State of its title. N.J. Stat. Ann. § 12:3-4 (enacted 1877.)

5. Such in general were the riparian rights of property owners in New Jersey in 1905, or shortly thereafter, rights which continue to be in effect to the present day.

Actions of the State of New Jersey Asserting Its Riparian Jurisdiction Over the Lands of the Delaware River Within the Twelve Mile Circle

6. The State of New Jersey, first through its Legislature and its Governors, and then after 1871 through the Council and its predecessors, has approved numerous conveyances and leases of riparian lands extending waterward from the present

or former mean high water line beyond the low water mark of the Delaware River within the Twelve Mile Circle defined in *New Jersey v. Delaware*, 295 U.S. 694 (1935) (decree.) Indeed, a pier or dock must extend a sufficient distance beyond the low water mark in order that vessels at low tide can freely traverse between the channel and the landing. Without such access, riparian rights would be largely illusory.

7. Typically, the Council's actions anticipated the construction of piers and were, for the period 1914 to approximately 1978, accompanied by the State's regulatory authorization to build the structures, or by permits issued to legalize structures already in place.

Henry J. Sherman, a Consulting Engineer with the Board of Commerce and Navigation, one of the predecessor agencies to the present Council, described this permitting authority in his testimony before the Special Master in the 1934 proceedings. (Stip. Rec. at 85.)[1]

From 1978 to the present, the Council conditioned its approval of a grant, license or easement on the applicant's obtaining a New Jersey regulatory permit, together with all other required federal, New Jersey and local regulatory permits.

8. On at least eight occasions between 1854 and 1905, the State of New Jersey exercised its riparian jurisdiction by approving State tidelands conveyances beyond the low water

1. *New Jersey v. Delaware*, No. 11, Orig., Volume 1, Stipulated Record Testimony, United States National Archives & Records Admin., Record Group 267, Box 155, location: 17E4/06/23/05 - 24/01.

line within the Twelve Mile Circle. I further found 33 instances between 1905 and the present in which the State of New Jersey continued to exercise its riparian jurisdiction on the New Jersey side of the River within the Twelve-Mile Circle. These actions from 1854 to the present involved 48 separate tracts of land that were granted, leased or licensed by the State to private or governmental entities. Consistent with New Jersey's conveyances before 1905 and with the provisions of the Compact of 1905, the State of New Jersey, acting through the Board of Riparian Commissioners and its successors, approved and delivered each of these State tidelands grants and leases without limiting the grant or conveyance to the low water line. The Board of Riparian Commissioners and its successors typically relied on previously established or then modified pierhead and bulkhead lines as the presumptive limit to which the grantees could extend their riparian structures. The pierhead lines established in 1877 and in 1916 in this area were located well beyond the mean low water line.

Actions of the State of New Jersey Asserting its Riparian Jurisdiction Over the Lands of the Delaware River in the Twelve Mile Circle Before the Compact of 1905.

A map depicting the grants identified below is annexed as an exhibit to this affidavit. The numbers on the map correspond to the following numbered paragraphs. In all of the riparian grants listed, the State granted riparian rights extending beyond the mean low water line.

Appendix 5

(1) 1854 N.J. Laws ch. 143, p.375. This Act authorized Thomas D. Broadway, et al., to build and maintain docks, piers or wharves in front of their lands at Pennsville in the Township of Lower Penns Neck, Salem County.[2] (Record, No. 11, Orig., Pl. Exs. 41, 131.)[3] The Act provided that Broadway was authorized to extend these structures into the Delaware River "a sufficient distance for the accommodation of vessels navigating" the River, but not "so far into the said river as to injure or impede the navigation of the same." 1854 N.J. Laws ch. 143, p.375, § 1. This pier was at the foot of Main Street in Pennsville. It was included within the 1923 State grant to William D. Acton. (Record, No. 11, Orig., Pl. Exs. 3, 57 (Grant "P").)

Mr. Sherman testified during the 1934 proceedings that at that time a wharf existed at this location, owned by the Wilson Line. (Stip. Rec. at 279-80.)

(2) 1855 N.J. Laws ch. 109, p.274. This Act incorporated the Pennsgrove Pier Company and authorized it to build and maintain "a wharf or pier extending from the mainland into the river Delaware at the Village of Pennsgrove," Salem County.[4] The Act authorized the Company to enlarge, extend

2. Lower Penns Neck Township is now called Pennsville Township.

3. References to "Record, No. 11, Orig., Pl. Ex." are citations to exhibits admitted into evidence in the 1934 proceedings. *See New Jersey v. Delaware*, No. 11, Orig., Volumes 3-13, United States National Archives & Records Admin., Record Group 267, Boxes 156-165, location: 17E4/06/23/05 - 24/01

4. The Village of Pennsgrove is now called Penns Grove Borough.

and rebuild the pier and to "purchase, lease and hold such and so much land as is necessary for that purpose." (*Id.*, § 4; *see also* Record, No. 11, Orig., Pl. Exs. 42, 132.) This pier was at the foot of Main Street in Penns Grove. It was included within the 1916 State grant to the Pennsgrove Pier Company. (Record, No. 11, Orig., Pl. Exs. 3, 57 (Grant "B").)

Mr. Sherman testified in the 1934 proceedings about the pier on this property. (Stip. Rec. at 281.)

This pier was also the site of the gambling offense over which the State of New Jersey's jurisdiction was upheld in *New Jersey v. Federanko*, 29 N.J. 119, 139 A.2d. 30 (1958.)

This pier is identified on the tax map of the Borough of Penns Grove as Block 57, Lot 6. It is substantially outshore of the mean low water line, and it is taxed by Penns Grove.

(3) 1870 N.J. Laws ch. 131, p.346. This Act authorized Robert Walker, et al., to build wharves, piers and bulkheads in front of their lands in the Township of Upper Penns Neck.[5] (Record, No. 11, Orig., Pl. Exs. 48, 135.) The Act permitted the pier to extend up to 400 feet from the high water mark into the River, but not in the front of the land of any other person.

(4) 1870 N.J. Laws ch. 344, p.726. This Act authorized Joseph Guest to build and maintain a dock or wharf in front of his lands in the Township of Upper Penns Neck. The Act authorized Guest to extend the dock or wharf "a sufficient

5. Upper Penns Neck Township is now called Carneys Point Township.

distance into the Delaware River for the accommodation of vessels navigating the same, and from time to time to rebuild and repair the same." This wharf once extended 100 feet outshore of the high water line. (Record, No. 11, Orig., Pl. Exs. 44, 134.)

(5) 1871 N.J. Laws ch. 307, p.758. This Act authorized Henry Barber to build wharves, piers and bulkheads in front of his lands in the Township of Upper Penns Neck. (Record, No. 11, Orig., Pl. Ex. 43.) The Act allowed Barber to extend his pier up to 100 feet below the low water mark into the River. (*Id.*) The wharf was located at the foot of West Harmony Street, and was known as Barber's Wharf. A sketch in 1931 showed that it extended 430 feet outshore of the low water line, not the 100 feet called for in the statute. (*Id.* Ex. 133.) Mr. Sherman testified in the 1934 proceedings that the Barber Wharf once extended 400 feet outshore of the low water line. (Stip. Rec. at 282.)

(6) In 1871, the State of New Jersey expanded the authority of the Board of Riparian Commissioners to the lands under the tidal waters of the entire State, including the submerged tidal lands of the Delaware River in the area of the Twelve Mile Circle. 1871 N.J. Laws ch. 256, p.44, § 1, now codified as N.J. Stat. Ann. § 12:3-10. Thereafter, the Legislature no longer approved grants and leases of the State riparian interest but instead delegated that responsibility to the Board and its successors, and to the Governor, where that authority currently resides. N.J. Stat. Ann. § 13:1B-13 (2003).

(7) The State of New Jersey exercised its regulatory jurisdiction over the riparian lands on its side of the Delaware

River not only by approving conveyances of riparian lands but also by setting pierhead and bulkhead lines. On November 3, 1877, the Board of Riparian Commissioners of the State of New Jersey adopted pierhead and bulkhead lines for a portion of the Delaware River within the Twelve Mile Circle in the County of Gloucester and the County of Salem. Record, No. 1, Orig. Pl. Ex. 144. By virtue of this action, the Board advised that it would look with favor upon applicants whose construction plans for piers and filling were within these lines, and look with disfavor upon those which were not.

(8) Grant[6] to Daniel H. Kent of Wilmington, Delaware by the State of New Jersey, dated February 17, 1883, now offshore of Block 2 Lot 1, Elsinboro Township. Tract 1 extends 300 feet on one side and 400 feet on the other to the exterior line established by the Riparian Commissioners in the Delaware River and Salem Cove. (Record, No. 11, Orig., Pl. Ex. 92; *id* Exs. 3, 57 (Grant "R"); Liber I, page 218.)[7]

When a mortgage on the upland on this property was foreclosed, this riparian grant was held to be included in the area foreclosed upon. *Boon v. Kent*, 42 N.J.Eq. 131, 7 A. 344 (Ch. 1886.)

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6. In New Jersey riparian law, fee simple conveyances of the State's riparian interests are by recordable deeds called "grants." N.J. Stat. Ann. § 12:3-7.

7. References to "Liber I page 218," and the like are references to the location of an official copy of New Jersey State tidelands instruments in the records of the Bureau of Tidelands Management, Trenton, New Jersey. All such documents typically are also recorded in the records of the County Clerks or Registers of the counties involved.

This grant also indicates that the Board of Riparian Commissioners adopted Pierhead and Bulkhead lines in the Delaware River in the Twelve Mile Circle before the Compact of 1905 was approved. (Record, No. 11, Orig., Pl. Ex. 92 at 2-3.)

(9) Grant to Annie E. Brown by the State of New Jersey dated August 28, 1891, now offshore of Block 2801, Lot 4, Pennsville Township. This grant extended 850 feet on one side into Delaware Bay and 850 feet on the other to the Exterior Line of the New Jersey Board of Riparian Commissioners. (Record, No. 11, Orig., Pl. Exs. 84, 85; *see also id.* Exs. 3, 57 (Grant "N"); Liber G, page 380.)

Mr. Sherman testified in the 1934 proceedings that the low water line was 50 to 75 feet below the high water line at this grant location, and that the property was used for amusement park purposes, in conjunction with adjacent grants. (Stip. Rec. at 274.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 800 feet beyond mean low water. This grant also indicates that the Board of Riparian Commissioners adopted Pierhead and Bulkhead lines in the Delaware River in the Twelve Mile Circle before the Compact of 1905 was approved.

(10) Grant to Eugene Dupont, et al., all of New Castle County, Delaware, trading as E.I. Dupont de Nemours and Company, by the State of New Jersey dated November 27, 1891. Now in the Township of Carneys Point, just south of Carneys Point, this grant extends from high water into the Delaware River 550 feet to the Commissioners' Exterior Line. (Record, No. 11, Orig., Pl. Exs. 70-72; *see also id.* Exs. 3

and 57 (Grant "E"); Liber G, page 386.) This grant also indicates that the Board of Riparian Commissioners adopted Pierhead and Bulkhead lines in the Delaware River in the Twelve Mile Circle before the Compact of 1905 was approved.

Actions of the State of New Jersey Asserting its Riparian Jurisdiction in the Delaware River Within the Twelve Mile Circle After the Compact of 1905.

(11) Grant to James A. Denny, et al., by the State of New Jersey dated April 26, 1906. Now offshore of Block 1 Lot 4, Penns Grove Borough, this grant extends 500 feet waterward of high water into the Delaware River. (Record, No. 11, Orig., Pl. Exs. 58, 59; *id.* Exs. 3, 57 (Grant "A"); Liber Q, page 721.)

Mr. Sherman testified that the "low water line at this location is 50 feet beyond the high water line, so that 450 feet of the area conveyed by the Riparian Commissioners [of New Jersey] to Denny would be beyond the low water line." (Stip. Rec. at 122.) The structure built within this grant is identified as Denny's Wharf on Riparian Atlas Sheet No. 710.[8]

(12) Grant to Pennsgrove Pier Co. by the State of New Jersey dated March 21, 1916. Now offshore of Block 57, Lot 1,

8. Riparian Atlas Sheets are on file with the Bureau of Tidelands, Trenton, New Jersey, and are a record of the actions of the State regarding riparian matters by location. The current versions of these indexes are called Conveyance Overlays.

Penns Grove Borough, this grant extends 885 feet outshore of high water on one side and 975 feet on the other to the New Jersey Pierhead and Bulkhead line. (Record, No. 11, Orig., Pl. Exs. 60, 62 and 63; *see also id.* Exs. 3, 57 (Grant "B"); Liber U, page 684.) This grant is recorded in the records of deeds of Salem County, New Jersey, in Deed Book 130, page 383.

This pier is identified on the tax map of the Borough of Penns Grove as Block 57, Lot 6. It is substantially outshore of mean low water, and it is taxed by Penns Grove.

This pier has been assessed for New Jersey municipal taxes since at least 1915. (Stip. Rec. at 116.) Riparian Atlas Sheet No. 710 identifies this as the Wilson Line Pier.

The taxability of this granted area by Penns Grove was the subject of the court's decision in *Main Associates, Inc. v. B. & R. Enterprises, Inc.*, 74 N.J. Super. 483, 181 A.2d 541 (Ch. Div. 1962.)

On July 13, 2004 Fenwick Commons, LLC, applied to the Delaware Department of Natural Resources and Environmental Control for a Subaqueous Lands Lease and Water Quality Certification to refurbish a 750 foot long pier and other structures and to fill 1,882 square feet of tidal lands at Penns Grove, Salem County, New Jersey. The pier involved was originally called the Penns Grove Pier. The area of the pier was the subject of the 1916 grant by the State of New Jersey. The Fenwick Commons application states that a portion of the filled area is lands between mean high water and mean low water. These lands are entirely in the State of New Jersey and appear to be approximately 722 square feet based on data in the application.

(13) Lease to Harry S. Barber by the State of New Jersey dated March 21, 1916. Now outshore of Block 54, Lots 1 and 2, Penns

Grove Borough, this lease extends 575 feet from the original high water line into the Delaware River. (Liber U, page 699.) This lease was convertible into a grant. A further fifteen year lease is dated July 17, 1916. (Liber V, page 57.) This lease was foreclosed upon on November 2, 1926. (Case 2652.)[9]

(14) On August 21, 1916, the Board of Commerce and Navigation, a successor agency to the Board of Riparian Commissioners, adopted pierhead and bulkhead lines on portions of the eastern side of the Delaware River. By doing so, the Board asserted New Jersey's riparian jurisdiction over the entire area landward of the pierhead lines. The entire area, including the portion landward of the exterior line for piers within the Twelve Mile Circle, extended well offshore of mean low water. By virtue of this action, the Board advised that it would look with favor upon applicants whose construction plans for filling and piers were within these lines, and look with disfavor upon those which were not. Plaintiff's Exhibit 145 in No. 11, Orig., shows the lines adopted between Penns Grove, New Jersey and Cedar Point, New Jersey. (Record, No. 11, Orig., Pl. Ex. 145.) The distances between low water and the exterior line scale from 375 feet at Deep Water Point (its nearest approach) to 3,550 feet waterward of low water at Helm's Cove, New Jersey.[10]

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9. References to "Case No." or "Tidelands Application No." are references to files now or formerly in the Bureau of Tidelands Management, Trenton, New Jersey. Not all files referenced have survived.

10. Plaintiff's Brief Before the Special Master 95, *New Jersey v. Delaware*, No. 11, Orig. (1933).

Appendix 5

(15) Grant to E. I. Dupont de Nemours & Co. ("Dupont") by the State of New Jersey, dated August 21, 1916. There are nine tracts, all within the Twelve Mile Circle in either Pennsville Township, Carneys Point Township or Penns Grove Township. The tracts extend from the high water mark into the Delaware River various distances from 202 feet on one side of Tract One to 4,222.1 feet (0.80 of a mile) on one side of Tract Seven. (Record, No. 11, Orig., Pl. Exs. 64, 68-69, 71-72; *id.* Exs. 2, 57 (Grant "D"); Liber V, page 92; Case No. 148.)

Mr. Sherman testified that the improvements on these properties included a sewer outfall, a seawall and a wharf. (Stip. Rec. at 135-36.) There also was a water intake pipe which extended a "substantial distance" into the River beyond the low water mark. (*Id.* at 138.)

(16) Grant to Dupont by the State of New Jersey dated November 20, 1916, now offshore of Block 301, Lot 1, Pennsville Township, at Deep Water Point. This grant extends 661.3 feet from high water on one side and 650 feet on the other, into the Delaware River, both to New Jersey's Pierhead and Bulkhead line (1915). (Record, No. 11, Orig., Pl. Exs. 66, 68, 69; *id.* Exs. 3, 57 (Grant "G"); Liber V, page 161; Case No. 493.)

(17) Grant to Dupont by the State of New Jersey dated July 16, 1917, consisting of two tracts, now offshore of Block 1 or 301, Lot 1, Pennsville Township. This grant extends 668 feet on one side of tract 1, and 648 feet on both sides of tract 2, outshore of the high water line and into the Delaware River, all to New Jersey's Pierhead and Bulkhead line (1916.)

Appendix 5

(Record, No. 11, Orig., Pl. Exs. 65, 68; *id* Ex. 3, 57 (Grant "F"); Liber W, page 62.)

(18) Lease to Dupont by the State of New Jersey dated May 20, 1918, now outshore of Block 301, Lot 1, Pennsville Township. This lease extended 736.21 feet waterward of the high water line of the Delaware River on one side and 718 feet on the other, both to New Jersey's Pierhead and Bulkhead Line (1916.) This lease was cancelled February 6, 1939 at Dupont's request, and riparian rights thereto reverted to the State of New Jersey by operation of law. N.J. Stat. Ann. § 12:3-10 (as amended 1938.) (Case No. 785A.)

(19) Grant to French's Hotel Company by the State of New Jersey dated October 17, 1921, now offshore of Block 57, Lot 1, Penns Grove Borough. This grant extends outshore from the high water mark 1,135.38 feet (0.21 miles) on one side and 1,283.86 feet (0.24 miles) on the other, and into the River. (Record, No. 11, Orig., Pl. Exs. 61-63; *id.* Exs. 3, 57 (Grant "C"); Liber C-1, page 217.) This grant is recorded in the records of deeds of Salem County, New Jersey, in Deed Book 166 page 330.

The area of this grant is identified on the tax map of the Borough of Penns Grove as Block 57, Lot 6.01. This lot is all or nearly all outshore of mean low water, and it is taxed by the Borough of Penns Grove.

(20) Grant to William D. Acton by the State of New Jersey dated February 19, 1923, now offshore of Pennsville Township. This grant extends 333.52 feet from the original high water line to the corner of a pre-existing pier, and another 580 feet further waterward to New Jersey's Pierhead and Bulkhead line (1916)

on one side, and 360.75 feet from the original high water line to a corner of a pre-existing pier, and another 572.66 feet further waterward to New Jersey's Pierhead and Bulkhead line (1916), on the other side. This pier was at the foot of Main Street in what was then Lower Penns Neck. (Record, No. 11, Orig., Pl. Exs. 89, 91; *id.* Exs. 3, 57 (Grant "P"); Liber D-1, page 459.)

In 1934, this grant area was used as a pier for the operation of the Delaware and New Jersey Ferry Company's ferry between Pennsville, New Jersey and New Castle, Delaware. Mr. Sherman further testified that this grant extended a "substantial distance" below the low water mark. (Stip. Rec. at 147.)

(21) Grant to William D. Acton by the State of New Jersey dated November 19, 1923, now offshore of Block 1091, Lot 2, Pennsville Township. This grant is within a tax lot in the records of Pennsville Township: Block 1091, Lot 2.01. It extends 970 feet on one side from the high water mark into the River, and 964 feet from the former high water line on the other side to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Exs. 86, 87; *id.* Exs. 3, 57 (Grant "L"); Liber E-1, page 245; Case No. 2040.)

Mr. Sherman testified there was a pier on the granted tract used for landing boats to carry people to and from a park adjoining the pier. This pier extended 494 feet below the low water mark. (Stip. Rec. at 145.) This was the pier used by the Riverview Beach Company. (Stip. Rec. at 275.) Riparian Atlas Sheet No. 704 identifies the upland parcel as Riverview Beach Park.

(22) Lease to Fogg and Hires Company for 15 years by the State of New Jersey dated August 18, 1924, now outshore of

Block 2801, Lot 6, Pennsville Township, at the foot of Ferry Road. This lease extends 985.44 feet offshore from the former high water line of the Delaware River on one side and an approximately equal distance offshore on the other side to New Jersey's Pierhead and Bulkhead line (1916.) (Liber G-1, page 135.)

This lease was cancelled May 18, 1930. In its place the State of New Jersey issued a grant to the Delaware - New Jersey Ferry Company dated May 19, 1930, with the same dimensions. (Record, No. 11, Orig., Pl. Ex. 90; *id.* Ex. 3, 57 (Grant "O"); Liber T-1, page 75; Case No. 2304.)

(23) Grant to William D. Acton by the State of New Jersey dated August 17, 1925, now offshore of Block 1091, Lot 2, Pennsville Township. This grant is within a tax lot in the records of Pennsville Township: Block 1091, Lot 2.01. This grant extends 863.21 feet from the former high water line into the Delaware River on one side, and 853.87 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916). (Record, No. 11, Orig., Pl. Exs. 80-81; *id.* Exs. 3, 57 (Grant "J"); Liber H-1, page 81; Case No. 2609.)

Mr. Sherman testified that this grant extended approximately 800 feet below the low water line. (Stip. Rec. at 142.) At that time there was a jetty in place to protect a beach from erosion, and an adjacent pier. The site was called Riverview Beach Park at Pennsville, an amusement park with bathing and boating. The adjacent dock was used for steamships, and the structures were assessed for local property taxes in New Jersey. (Stip. Rec. at 272-273.)

(24) Grant to William D. Acton by the State of New Jersey dated August 17, 1925, the same date as the previous grant,

now offshore of Block 2801, Lot 1, Pennsville Township. This grant extends 965.40 feet on one side and 966.63 feet on the other beyond the former high water line of the Delaware River to New Jersey's Pierhead and Bulkhead line (1916.) The grant is just south of the foot of Pittsfield Street, in what was then Lower Penns Neck Township. (Record, No. 11, Orig., Pl. Ex. 83; *id.* Exs. 3, 57 (Grant "M"); Liber K-1, page 58; Case No. 2204.)

(25) Grant to the Township of Lower Penns Neck by the State of New Jersey dated September 21, 1925, now offshore of Pennsville Township. This grant extends 966.83 feet on one side and 969.91 feet on the other, outshore of the former high water line of the Delaware River. This grant is at the foot of Pittsfield Street, in what was then Lower Penns Neck. (Record, No. 11, Orig., Pl. Ex. 82; *id.* Exs. 3, 57 (Grant "K"); Liber K1, page 94; Case No. 2204A.)

(26) Grant to William D. Acton by the State of New Jersey dated October 19, 1925, now outshore of Pennsville Township. This grant extends from the former high water line 360.75 feet to a point on an adjoining pier, and then another 572.68 feet into the Delaware River on one side to New Jersey's Pierhead and Bulkhead line (1916), and 375.41 feet to a point waterward and then another 565.67 feet further waterward to New Jersey's Pierhead and Bulkhead line (1916) on the other side. (Record, No. 11, Orig., Pl. Ex. 88; *id.* Exs. 3, 57 (Grant "O"); Liber H-1, page 171; Case No. 2717.)

(27) Grant to The Franklin Real Estate Company by the State of New Jersey dated June 18, 1928, now offshore of Block 301, Lot 13, Pennsville Township. This grant extends 991.46 feet from high water into the Delaware River on one side and 827.70

feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916). (Record, No. 11, Orig., Pl. Ex. 73; *id.* Exs. 3, 57 (Grant "H").) The Deep Water Power Plant was constructed on the upland at this site. (*Id.* Ex. 74; Liber P-1, page 223.) This grant abuts the Delaware Memorial Bridge.

A confirmatory grant, as authorized by N.J. Stat. Ann. § 12:3-38, was approved for this property by the State of New Jersey on January 20, 1930. (Liber W-1, page 114.) There had been an error in identifying the name of the grantee in the 1928 grant. (Case No. 3446.)

(28) Grant to Anna C.B. Locuson by the State of New Jersey dated April 15, 1929, now offshore of Block 301, Lot 6, Pennsville Township. This grant extends 813.97 feet into the Delaware River from the high water line on one side and 809.16 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 76; *id.* Exs. 3, 57 (Grant "I-2"); Liber Q-1, page 169; Case No. 3851.)

(29) Grant to Josephine Grace Locuson, et al., by the State of New Jersey, dated April 15, 1929, now offshore of Block 301, Lot 7, Pennsville Township. This grant extends from the high water line of the Delaware River waterward 813.97 feet on one side and approximately 818.78 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 77; *id.* Exs. 3, 57 (Grant "I-3"); Liber Q-1, page 155; Case No. 3852-1.)

(30) Grant to Josephine Grace Locuson, et al., by the State of New Jersey, dated April 15, 1929, now offshore of Block 301, Lot 8, Pennsville Township. This grant extends from the high water mark 823.60 feet on one side and 818.78 feet on the other,

into the Delaware River, both to New Jersey's Pierhead and Bulkhead line (1916). (Record, No. 11, Orig., Pl. Ex. 78; *id.* Exs. 3, 57 (Grant "I-4"); Liber Q-1, page 149; Case No. 3854.)

Mr. Sherman testified that the low water line was 75 feet beyond the high water line at this location. (Stip. Rec. at 141-2.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 748 feet beyond the mean low water line.

(31) Grant to William G Locuson by the State of New Jersey, dated April 15, 1929, now offshore of Block 301, Lot 9, Pennsville Township. This grant extends 827.70 feet waterward of the high water line on one side and 823.60 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 79; *id.* Exs. 3, 57 (Grant "I-5"; Liber S-1, page 251; Case No. 3855.)

Mr. Sherman testified that low water was 75 feet beyond the high water mark at this grant location. (Stip. Rec. at 141-142.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 752 feet beyond mean low water.

(32) Grant to Josephine Grace Locuson, et al., by the State of New Jersey, dated June 17, 1929, now offshore of Block 310, Lots 4 and 5, Pennsville Township. This grant extends from the high water line 809.16 feet into the Delaware River on one side and 797.42 feet on the other, both to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 75; *id.* Exs. 3, 57 (Grant "I-1"); Liber Q-1, page 217; Case No. 3552-2.)

Appendix 5

Mr. Sherman testified in the 1934 proceedings that low water was 75 feet beyond the high water mark at this grant location. (Stip. Rec. at 140.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 734 feet beyond the mean low water line.

(33) Grant to Dupont by the State of New Jersey dated October 21, 1929, now offshore of Block 1 or 301, Lot 1, Pennsville Township. This grant extends from the mean high water mark 648 feet into the Delaware River to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 94; *id.* Exs. 3, 57 (Grant "T"); Liber Q-1, page 285.)

(34) License to the Delaware River Power Company by the State of New Jersey dated October 21, 1929, now offshore of Pennsville Township. This license accommodates eight armored submarine electric cables at Deep Water Point. The map attached to the grant shows both the high water line and the low water line, and shows the cables and the license extending well offshore of low water, 648 feet from high water to the exterior line. The distance from high water to low water at the time of this license was 75 feet. (Record, No. 11, Orig., Pl. Exs. 67, 68, 97; *id.* Exs. 3, 57 (Grant "U"); Case No. 4050)

Mr. Sherman testified that several concrete icebreakers were installed at this location "a substantial distance" below the low water mark for the purpose of protecting the cables. (Stip. Rec. at 151.)

(35) Lease to the Penn Beach Property Owners' Association by the State of New Jersey dated October 21, 1929, now outshore of Block 3524, Lot 1, Pennsville Township. This lease extended 429.49 feet beyond the mean high water line on one side and

430.70 feet on the other to New Jersey's Pierhead and Bulkhead line (1916.) (Record, No. 11, Orig., Pl. Ex. 95; *id.* Exs. 3, 57 (Grant "V"); Liber V-1, page 268.)

A sketch of the property at the time of the 1934 proceedings showed a timber pier extending in this lease area 80 feet beyond the low water mark and 130 feet beyond the high water mark. (Record, No. 11, Orig., Pl. Ex. 96.) A clubhouse was situated at the back of the pier, which was also used for boating and fishing. (Stip. Rec. at 277-78.)

This lease was converted into a grant on November 20, 1933 by the State of New Jersey. The dimensions of the grant remained the same as for the lease. (Liber C-2, page 33; Case No. 4008.)

Actions of the State of New Jersey Asserting its Riparian Jurisdiction Over the Lands of the Delaware River in the Twelve Mile Circle After the 1935 Decree.

(36) Grant to J. Landis Strickler by the State of New Jersey dated September 16, 1935, now outshore of Block 54, Lot 1, Penns Grove Borough. This grant extends 249.36 feet waterward of the center line of Delaware Avenue but follows the line of a previously existing sea wall. Although all of the lands conveyed in this grant were then upland, it appears that a portion of the granted land is waterward of the original former mean low water line. (Liber D-2, page 150.)

Portions of this property are within areas leased to Harry S. Barber in 1916 in two leases. The 1916 fifteen-year lease was foreclosed upon in 1926.

Appendix 5

(37) Grant to Dupont by the State of New Jersey dated September 13, 1943, now outshore of the Salem Canal, immediately north of Block 301, Lot 13.01, Township of Pennsville. A portion of these granted lands is outshore of mean low water measuring on the State's Conveyance Overlay to be approximately 210 feet. (Liber R-2, page 55; Case No. 4927-A.)

(38) Grant to Sun Oil Company by the State of New Jersey dated October 14, 1957, now outshore of Block 101, Lots 2 and 5, Logan Township, Gloucester County. This grant extends 1,245 feet from the mean high water line on one side and 1,245.82 feet on the other into the Delaware River. (Liber A-4, page 248; Case No. 8928-A.)

The tax map for Logan Township shows the area granted to the Sun Oil Company, an area nearly all below mean low water, as Block 101, Lots 2.01 and 2.02. Lot 2.01 appears to be upland, while Lot 2.02 is substantially below mean low water. Lot 2.02 is depicted and taxed by Logan Township even though it is substantially waterward of the state boundary line.

(39) Grant to Dupont by the State of New Jersey dated March 31, 1960, now outshore of Block 1, Lot 1, Pennsville Township. This grant extends 1,027.61 feet waterward of the high water line of the Delaware River on one side and 1,096 feet on the other, both out to New Jersey's Pierhead and Bulkhead line (1916.) The grant includes as a second tract a further area 100 feet waterward of that pierhead line. The grant of this second tract was expressly subject to approval by the United States Army Corps of Engineers. (Case No. 9490.)

Appendix 5

(40) Grant to Dupont by the State of New Jersey dated September 29, 1967. This grant is outshore of Block 1, Lot 1, Pennsville Township and abuts to the north the 1960 grant to Dupont, *supra*. It extends 1,096 feet offshore of the high water line of the Delaware River on one side and 1,155 feet on the other. The mean low water line measures on the State's Conveyance Overlay to be approximately 20 feet waterward of mean high water at this grant's location. (Liber R-5, page 80; Tidelands Application No. 66-43.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 1,135 feet beyond the mean low water line.

(41) A lease to Keystone Urban Renewal Limited Partnership by the State of New Jersey dated June 12, 1992. This lease is outshore of Block 101, Lots 2 and 5, Logan Township, Gloucester County and outshore of part of the State's 1957 Grant to the Sun Oil Company. (Liber H-8, page 79; Tidelands Application No. 91-0190.) This lease area extends approximately 1,600 feet offshore of the original mean high water line into the Delaware River.

The tax map for Logan Township shows the area granted to Sun Oil Company, an area nearly all below mean low water, as Block 101, Lots 2.01 and 2.02. The tax map further shows the area leased to Keystone, an area which is outshore of the Sun Oil grant, and therefore even further below mean low water, as Block 101, Lot 2.03. These lots are assessed and taxed by Logan Township. On September 30, 1991, the State of Delaware granted Keystone Cogeneration Systems, Inc. permission to construct a coal unloading pier and to conduct dredging at this location. The document included a Subaqueous Lands Lease for ten years, which may be renewed in the public interest.

Appendix 5

(42) A lease to William J. Bergmann, et al., by the State of New Jersey initially dated January 11, 1999, and renewed February 13, 2002. This lease extends 35 feet waterward of the high water line. It is located offshore of Block 1601, Lot 25, on North River Drive in the Township of Pennsville.

At this location, mean low water measures approximately 10 feet waterward of mean high water on the State's Conveyance Overlay. (Tidelands Application No. 87-1261.) Thus, the upland owner could develop the waterfront at this location to the maximum extent of 25 feet beyond the mean low water line.

(43) A lease to the Township of Pennsville by the State of New Jersey dated April 25, 2000. This lease is outshore of Block 3428, part of Lot 1 at the foot of Dartmouth Road. The leased area extends 95 feet offshore of the existing bulkhead and mean high water line (1999). (Tidelands Application No. 00-0012.)

At this location, the low water line measures not more than 60 feet waterward of the high water line on the State's Conveyance Overlay. Thus, the upland owner could develop the waterfront at this location to the maximum extent of 35 feet beyond the mean low water line.

(44) Assignment of Management Rights (lease) to the New Jersey Division of Parks and Forestry by the State of New Jersey dated January 24, 2001, now offshore of Block 5301, Lot 3, Elsinboro Township. The project site includes a pier outshore of the property. This pier extends 350 feet waterward of the high water line into the Delaware River. The lands involved are part of Fort Mott State Park, and the pier was rebuilt to its footprint as of 1898. (Liber M-9, page 74; Tidelands Application No. 95-0306.) New Jersey's Department of Environmental

Protection approved a Waterfront Development Permit and Water Quality Certificate (No. 1708-95-0014.1) on January 26, 1996. One of the Administrative Conditions in this permit imposed by New Jersey was that certain aspects of this project were subject to approval by the State of Delaware, specifically, the installation of floating ferry moorings, associated pilings and the removal of rip-rap against the crib structure below mean low water. Delaware's Department of Natural Resources and Environmental Control approved a subaqueous lands lease for this project on February 7, 1996.

The Adverse Impact of Delaware's Actions on the State of New Jersey and on Private Property Owners in the Twelve Mile Circle

9. The Twelve Mile Circle intersects the eastern bank of the Delaware River so that the State and local boundaries of seven New Jersey municipalities are all or partially at the mean low water line of the River. Those municipalities are Logan Township, Gloucester County, whose shoreline is partially within the Circle, Oldmans Township, Penns Grove Borough, Carneys Point Township, Pennsville Township and Elsinboro Township, all in Salem County, whose River shorelines are entirely within the Circle, and Lower Alloways Creek Township, Salem County, whose River shoreline is partially within the circle.

10. Because the shoreline is naturally irregular, the total length of the Delaware River shoreline in New Jersey between the northern intersection of the Circle and the southern intersection of the Circle with the low water line is approximately 29 miles. The State of New Jersey owns Fort Mott State Park in Pennsville

which has substantial waterfrontage on the Delaware River within the Twelve Mile Circle.

11. The State of New Jersey can, as a waterfront owner, seek State tidelands licenses for piers to be built along the eastern shore of the Delaware River within the Twelve Mile Circle. If it must also receive regulatory approval from the State of Delaware and secure a Delaware Submerged Lands conveyance, then there could be a significant negative effect on the State and its potential development of its public areas. For example, if the State of New Jersey wished to construct public fishing piers offshore of its lands or boardwalk trails to enhance public access in these State-owned upland areas, it would have to seek approval from Delaware regulatory officials as well as those of the State of New Jersey. This could lead to contradictory determinations from the permitting authorities.

12. Private riparian owners on the Delaware River in the Twelve Mile Circle would face the same problem. The prospect of contradictory determinations from the two States can reasonably be expected to discourage development applications.

13. The Bureau of Tidelands Management administers the State's riparian lands program. In turn, the income from the State's riparian lands program has been dedicated to the Fund for the Support of Free Public Schools by State constitutional provision since at least 1898. N.J. Stat. Ann. §§ 18A:56-5 and -6 (1999); N.J. Const. Art. VIII § 4 ¶ 2. Long term, a negative effect on development of the Twelve Mile Circle will have a direct negative impact on the income received by the Bureau for conveyances and leases and reduce the income received by the State's School Fund.

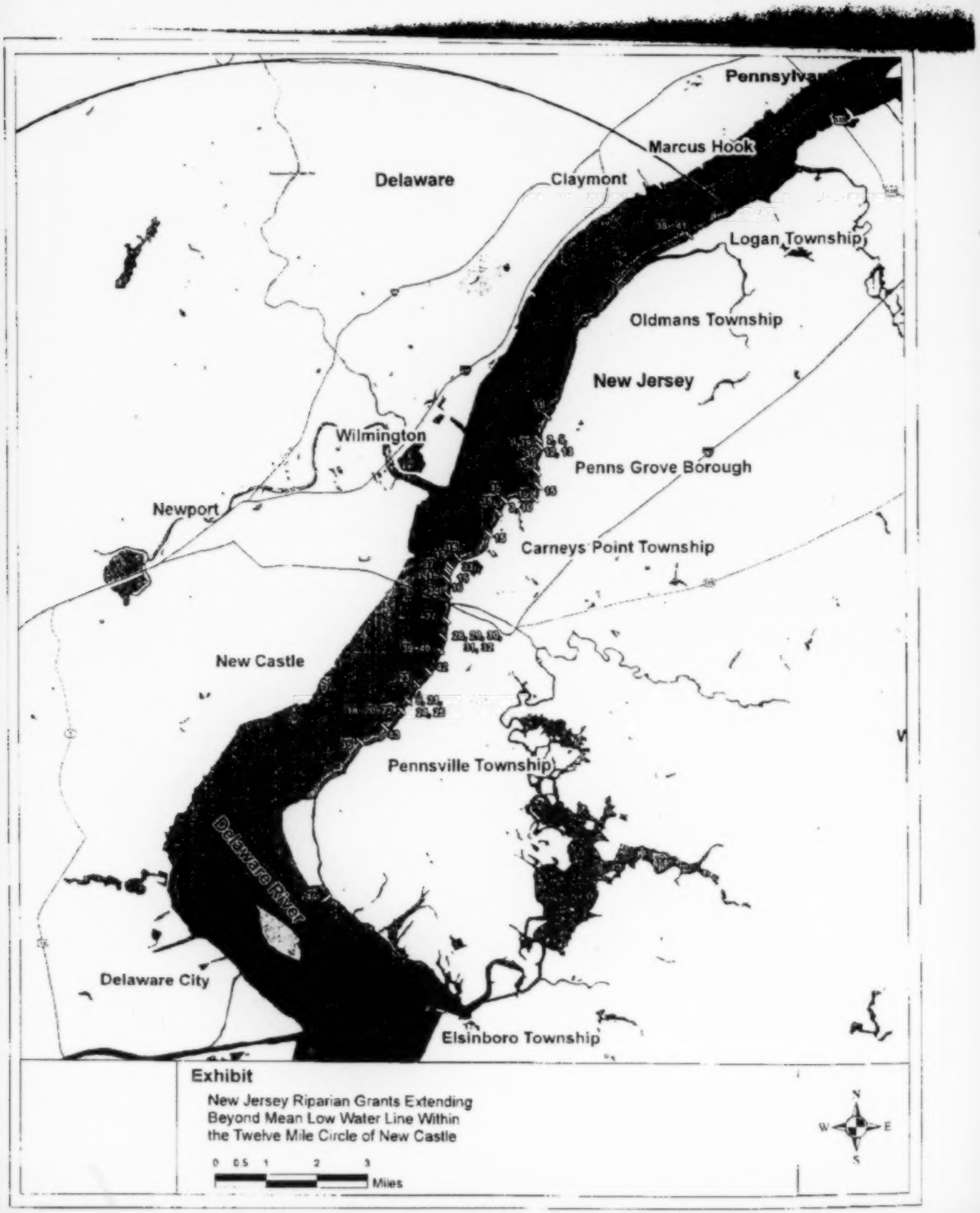
Appendix 5

_____/s/_____
Richard G. Castagna
Supervisor, Southern Region
Bureau of Tidelands Management
Post Office Box 439
Trenton, New Jersey 08625-0439
(609) 292-2573

Subscribed and sworn
to before me this
27th day of June 2005
_____/s/_____
Mary Ann Herman
Notary Public
State of New Jersey
My Commission Expires 2/28/07

APPENDIX 6 — AFFIDAVIT OF RICHARD CASTAGNA, EXHIBIT A-MAP OF NEW JERSEY RIPARIAN GRANTS *EXTENDING BEYOND MEAN LOW WATER LINE* WITHIN THE TWELVE MILE CIRCLE OF NEW CASTLE

[Map - fold-out page]


Pennsylvania
Marcus Hook
Delaware
Claymont
Logan Township
Oldmans Township
New Jersey
Wilmington
Penns Grove Borough
Newport
Carneys Point Township
New Castle
Pennsville Township
Delaware River
Delaware City
Elsinboro Township
Exhibit
New Jersey Riparian Grants Extending Beyond Mean Low Water Line Within the Twelve Mile Circle of New Castle
0 0.5 1 2 3
Miles
N
W
E
S

APPENDIX 7 — AFFIDAVIT OF JEFFREY READING, DATED JUNE 23, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF JEFFREY T. READING IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Mercer:

I, JEFFREY T. READING, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Assistant Director of the Division of Water Quality, in the State of New Jersey, Department of Environmental Protection ("DEP"). I have served the DEP

in this capacity since 2000. I have knowledge of the matters set forth herein, based upon my personal knowledge and upon my review of the DEP files in this matter.

2. I have been employed by the DEP since 1980. From 1996 to 2000, I served as the Bureau Chief, Bureau of Point Source Permitting – Region 1. From 1992 to 1996, I served as Bureau Chief, Bureau of Watershed Permitting (formerly Bureau of Municipal Discharge Permits). From 1987 to 1991, I served as an Environmental Scientist I in the Bureau of Industrial Discharge Permits. From 1982 to 1987, I worked in the Bureau of Water Quality Standards and Analysis, serving as an Environmental Scientist I (1987), Environmental Scientist II (1986-1987), Environmental Scientist III (1983-1986) and Senior Environmental Specialist (1982-1983). From 1981 to 1982, I served as a Senior Environmental Specialist in the Bureau of Monitoring and Data Management. From 1980 to 1981, I served as an Environmental Specialist in the Bureau of Monitoring and Data Management. Since 1982, I have worked on various aspects of the development, review, issuance and monitoring of water pollution discharge permits.

3. The DEP's New Jersey Pollution Discharge Elimination System ("NJPDES") Program protects New Jersey's ground and surface water quality by assuring the proper treatment and discharge of wastewater (and its residuals) and stormwater from various types of facilities and activities, as well as municipalities, counties, public complexes and highway agencies. To accomplish this, permits are issued limiting the mass and/or concentration of pollutants which may be discharged into ground water, streams, rivers and the ocean, or through the imposition of best management

practices for stormwater discharges. The types of regulated facilities can range from very small users such as campgrounds, schools, and shopping centers to larger industrial and municipal wastewater dischargers.

4. The Federal National Pollution Discharge Elimination System Program, established by Congress pursuant to 33 *U.S.C.A.* §§ 1311 and -1342(a) (2005), is administered by the United States Environmental Protection Agency ("EPA"). From 1972 to 1981, EPA issued permits to dischargers located in New Jersey. In 1981, EPA delegated this permitting authority to New Jersey. Since then, that program has been implemented by New Jersey through the DEP's NJPDES program.

5. The legal authority for the NJPDES Program is the New Jersey Water Pollution Control Act, *N.J.Stat.Ann.* §§ 58:10A-1 *et seq.* (2004) and the federal Clean Water Act, 33 *U.S.C.A.* § 1251 *et seq.* (2005). The regulatory scheme for the NJPDES Program is set forth at *N.J.Admin.Code* §§ 7:14A-1 *et seq.* (2005).

6. The DEP administers the NJPDES Program throughout the State of New Jersey, regulating pollution discharges from sources within New Jersey even when the outfall crosses the boundary of New Jersey into the State of Delaware within the length of the Delaware River located in the Twelve Mile Circle. The NJPDES Program has issued permits for wastewater treatment projects that are located along this length of the Delaware River and that discharge beyond the low water mark on the New Jersey shore of the Delaware River.

Appendix 7

7. Under the Delaware River Basin Compact, the NJPDES Program provides notice to the Delaware River Basin Commission, notwithstanding the location with respect to State boundaries, of each application for a NJPDES permit to discharge pollutants to the Delaware River.

8. I directed the identification of permits issued by the NJPDES Program for pollution discharges from facilities located on the New Jersey shore of the Delaware River. The outfall pipe for each of the facilities extends below the low water line of the Delaware River within the Twelve Mile Circle, and thus crosses the boundary of the State of New Jersey into the State of Delaware. Each of these permits remains in effect. I discuss those NJPDES permits below, progressing from north to south.

9. The NJPDES Program has issued NJPDES permit number NJ0076872 DSW to the Logan Generating Company, f/k/a Keystone Energy Service Company, L.P., in Logan Township, Gloucester County, New Jersey, to discharge an average of 1,440 gallons of groundwater per day from an underdrain system and stormwater, at a steam and electricity cogeneration station into the Delaware River beyond the low water mark and within the State of Delaware through two outfall structures.

10. The NJPDES Program issued NJPDES permit number NJ0024023 DSW to the Penns Grove Municipal Sewerage Authority in the Borough of Penns Grove, Salem County, New Jersey, to discharge up to 0.75 million gallons of treated wastewater per day from a wastewater treatment facility into the Delaware River beyond the low water mark and wi[illegible]

the State of Delaware through an outfall pipe located 209 feet from shore at a depth of 7.08 feet below the surface of the Delaware River.

11. The NJPDES Program has issued NJPDES permit number NJ0005100 DSW to the E.I. duPont de Nemours & Co., Chambers Works Plant, in Pennsville Township, Salem County, New Jersey, to discharge up to 62.8 million gallons per day of treated industrial wastewater, stormwater and non-contact cooling water from a chemical manufacturing plant into the Delaware River beyond the low water mark and within the State of Delaware through three outfall structures that are located up to 50 feet from the shoreline.

12. The NJPDES Program has issued NJPDES permit number NJ0005363 DSW to the Atlantic City Electric Co., d/b/a Connectiv Power Delivery, Deepwater Generating Station, in Pennsville Township, Salem County, New Jersey, to discharge up to 350 million gallons per day of non-contact cooling water, stormwater, and intake screen backwash water per day from a steam electric generating station into the Delaware River beyond the low water mark and within the State of Delaware through up to 14 outfall structures that are located up to 100 feet from the shoreline.

13. The NJPDES Program has issued NJPDES permit number NJ0021598 DSW to the Pennsville Municipal Sewerage Authority in Pennsville Township, Salem County, New Jersey, to discharge up to 1.875 million gallons per day of treated wastewater per day from a wastewater treatment facility into the Delaware River beyond the low water mark and within the State of Delaware through an outfall pipe

located 102 feet from shore at a depth of 4.5 feet below the surface of the Delaware River.

_____/s/_____
Jeffrey T. Reading
Assistant Director
State of New Jersey
Department of Environmental Protection
Division of Water Quality
401 East State Street, Floor 3E
Post Office Box 029
Trenton, New Jersey 08625-0029
(609) 292-4543

Subscribed and sworn
to before me this
23 day of June, 2005

_____/s/_____
Louise Konjushok
Notary Public of the
State of New Jersey

APPENDIX 8 — AFFIDAVIT OF FREDERICK SICKELS, DATED JUNE 22, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF FREDERICK SICKELS IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Mercer :

I, FREDERICK SICKELS, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Acting-Assistant Director of the Water Supply Permitting Element, in the State of New Jersey, Department of Environmental Protection ("DEP"), Division of Water

Supply. I have knowledge of the matters set forth herein, based upon my personal knowledge and upon my review of the DEP files in this matter.

2. The Bureau of Water Allocation within the Water Supply Permitting Element of the Division of Water Supply regulates all diversions of ground water and fresh surface water in New Jersey that are in excess of 100,000 gallons of water per day. *N.J.Stat.Ann.* § 58:1A-6 and -7 (2004). This includes water diverted for public water supply, industrial processing and cooling, irrigation, agriculture, sand and gravel operations, remediation, and power generation.

3. The Water Supply Permitting Element has exercised this jurisdiction since 2005. Prior to 2005, the DEP exercised this jurisdiction through its Water Supply Administration and its predecessor agencies. Prior to the establishment of the Department of Environmental Protection in 1970, the equivalent program was administered by the State of New Jersey, Department of Conservation and Economic Development.

4. Since 1907, the DEP Division of Water Supply and its predecessor agencies, the State Water Supply Commission; the Division of Water Policy and Supply; the Water Policy and Supply Council in the State Department of Conservation; the State Department of Conservation and Economic Development; and the Division of Water Resources, have been responsible for the economical and prudent development and equitable allocation of State's surface water resources for industrial and potable water supply.

5. The DEP Division of Water Supply administers the water supply management program throughout the State of New Jersey, regulating the diversion of water from a variety of sources, including the Delaware River, even where the diversion will withdraw water from the Delaware River through a pipe extending beyond the low water mark on the New Jersey shore of the Delaware River within the Twelve Mile Circle. The Water Resources Management section of the Bureau of Water Allocation has issued one water allocation permit to withdraw water from the Delaware River, along this length of the Delaware River, and through a pipe that extends beyond the low water mark on the New Jersey shore of the Delaware River.

6. Pursuant to the Delaware River Basin Compact between the States of New Jersey, Delaware, Pennsylvania and New York, *N.J.Stat.Ann.* § 32:11D-1 to -78 *et seq.* (2005), the Water Resources Management section of the New Jersey DEP's Bureau of Water Allocation ensures that each applicant for a Water Allocation Permit, to withdraw water from the Delaware River and into New Jersey, provides notice to the Delaware River Basin Commission. Such notice is provided by New Jersey for any request to withdraw water from the Delaware River into New Jersey, even if such withdrawal request involves an intake extending below the low-water mark within the Twelve Mile Circle.

7. My staff and I searched the databases and files of the Water Supply Permitting Element and identified a Water Allocation Permit number 4059 PS, that the DEP issued for an electricity and steam cogeneration facility located on the New Jersey shore of the Delaware River, that withdraws water

from the Delaware River, along the length of the Delaware River located in the Twelve Mile Circle, through a pipe that extends beyond the low water mark on the New Jersey shore of the Delaware River and crosses the boundary into the State of Delaware.

8. The DEP issued Permit number 4059 PS, dated April 10, 1991, to the Keystone Cogeneration Systems, Inc. in Logan Township, Gloucester County, New Jersey, to withdraw from the Delaware River up to 108.5 million gallons of water per month, at a maximum rate of 5,000 gallons per minute, for power generation operations at the facility. The intake structure for the water supply pipe is located at the outshore end of the pipe, approximately 1,600 feet from shore, at least 4 feet below the mean low water elevation and 2 feet above the bottom of the Delaware River. This permit remains in effect. The name of the permittee has been changed to Logan Generating Company, L.P.

9. As required by the Delaware River Basin Compact, Keystone Cogeneration Systems, Inc. provided to the Delaware River Basin Commission notice of its application to the DEP's Water Resources Management Section for Water Allocation Permit number 4059 PS. The DRBC considered the application under its Docket Number D-90-48, and issued a Notice of Commission Action on September 27, 1991, that modified the requested volume of water withdrawal. Pursuant to the State of New Jersey's obligations under the Delaware River Basin Compact, the DEP's Bureau of Water Allocation incorporated those limits into the final version of Water Allocation Permit number 4059 PS.

Appendix 8

_____/s/_____
Frederick Sickels

Post Office Box 426
Trenton, New Jersey 08625-0426
(609)292-2957

Subscribed and sworn
to before me this
22 day of June, 2005

_____/s/_____
David E. Leach IV
Notary Public of the
State of New Jersey

APPENDIX 9 — AFFIDAVIT OF KEVIN BRODERICK, DATED JUNE 16, 2005

No. 11, ORIGINAL

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF KEVIN BRODERICK IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Kevin James Broderick, of full age, being duly sworn according to law, hereby deposes and says:

1. I am employed by the Land Use Regulation Program (the "Program") of the State of New Jersey Department of Environmental Protection ("NJDEP"). I have been employed by NJDEP since 1980. I have knowledge of the matters set forth herein, based upon my personal knowledge and upon my review of the NJDEP files in this matter.

2. The Program administers and implements the New Jersey Waterfront Development Act, *N.J.Stat.Ann.* § 12:5-3 *et seq.*, Coastal Area Facility Review Act, *N.J.Stat.Ann.* § 13:19-1 *et seq.*, ("CAFRA"), the Coastal Wetlands Act, *N.J.Stat.Ann.* § 13:9A-1 *et seq.*, the Freshwater Wetlands Protection Act, *N.J.Stat.Ann.* § 13:9B-1 *et seq.* "FWPA", the Flood Hazard Area Control Act *N.J.Stat.Ann.* § 58:16 A-50 *et seq.*, ("FHACA") and the Program issues Water Quality Certificates pursuant to Section 401 of the Federal Clean Water Act (33 *U.S.C.* § 1251 *et seq*) for projects which require a federal permit of license and which propose to discharge fill or dredge material into waters of the United States. The purpose of the Certification is to insure that all such activities are consistent with New Jersey Water Quality Standards at *N.J.Admin.Code* 7:9-4.11 and the Federal Clean Water Act. The Program also issues Coastal Zone Consistency Determinations for State action under Section 307 of the Federal Coastal Zone Management Act (16 *U.S.C.* § 1451 *et seq.*), as amended, and certifies the proposed projects are consistent with the approved New Jersey Coastal Zone Management Program.

3. The New Jersey Legislature adopted the Waterfront Development Act in 1914 to coordinate navigation and development along the New Jersey waterfront and to address the construction or alteration of a dock, wharf, pier, bulkhead, bridge, pipeline, cable, or other similar or dissimilar waterfront development, *N.J.Stat.Ann.* § 12:5-3.

4. The Legislature adopted the Wetlands Act of 1970 to protect coastal wildlife and marine fisheries and to prohibit disturbances to coastal wetlands including altering marshes,

salt meadows, swamps and flats subject to tidal action in the State of New Jersey along the Delaware Bay and Delaware River. *N.J.Stat.Ann.* § 13:9A-1a.

5. The Legislature adopted the New Jersey Coastal Area Facility Review Act in 1973 to protect New Jersey's bays, harbors, sounds, wetlands inlets, tidal portions of fresh, saline or partially saline streams and tributaries and their adjoining upland fastland, beaches and intertidal areas, all of which the Legislature has found to constitute an exceptional unique, irreplaceable and delicately balanced coastal area. *N.J.Stat.Ann.* § 13:19-1.

6. Since 2002, I have served as the Manager of the Program's Bureau of Coastal Regulation along the New Jersey coast in Monmouth, Ocean, Atlantic, Cape May, Salem, Cumberland, Gloucester and Camden counties. As manager of the Program's Bureau of Coastal Regulation, I supervise and direct the implementation of Coastal Zone Programs, as well as the FWPA and the FHACA along the New Jersey coast in Camden, Gloucester, Cumberland, Salem, Cape May, Atlantic, Burlington, Ocean and Monmouth counties along the Delaware River, the Delaware Bay and the Atlantic Ocean.

7. Previously, between 1989 and 2001, I served as the supervisor for all of the coastal development projects in Cape May, Cumberland, Salem, Gloucester, Camden and Ocean counties. This area includes the five New Jersey municipalities of Logan Township in Gloucester County, and Penns Grove, Carneys Point, Pensville, and Elsinboro Township of Salem County, all of which include lands within the Twelve Mile Circle area defined in *New Jersey v.*

Appendix 9

Delaware, 295 U.S. 694, 55 S.Ct. 907, 79, L.Ed. 1659 (1935) (decree) (hereafter the "New Jersey Municipalities").

8. In my tenure as a supervisor for coastal development projects in Cape May, Cumberland, Salem, Gloucester, Camden and Ocean counties, I have inspected hundreds of sites for applications for proposed development for all types of structures which are attached to the adjoining uplands and which involve development of lands outshore of the low water line. These include, but are not limited to bulkheads, stormwater pipes, rip-rap, boat ramps, and docks and piers along the shorebanks and into the tidal waters of the Delaware River under the Waterfront Development Act, the Coastal Wetlands Act and CAFRA.

9. In cooperation with Mark Fedorowicz of the Program who serves as the custodian of the records of the actions of the Program in Salem and Gloucester Counties in which the Twelve Mile Circle lies, during the last month, I have caused a search to be done of records and files under the Program's various databases that exist for permits issued in the New Jersey Municipalities. The initial New Jersey coastal zone management rules were adopted in September 1978 and the databases of files date back to 1979. I have caused a search of the files to be done, both at the offices of the Program at 501 East State Street, Trenton, New Jersey 08611 and at the Program's warehouse at 1651 North Olden Avenue, Ewing Township, New Jersey 08638, for development applications involving waterfront property in the New Jersey Municipalities.

Appendix 9

10. Altogether, I have caused to be searched the relevant databases at the Program offices and at the Ewing Township warehouse, including approximately 350 boxes of archived files of the Program for the years 1979 through 1989. As a result, the Program has identified 58 development applications seeking permits which were listed in the database for the New Jersey Municipalities and which were submitted to the Program between 1979 and 1989. I have reviewed the 14 application files that could be found at the warehouse for this timeframe. In addition, the Program has reviewed another 22 development applications for the years between 1989 and 2001 for lands which are located in the New Jersey Municipalities.

11. The Program has issued a number of permits for development that starts on the New Jersey shore and extends into the Delaware River beyond the mean low water line within the Twelve Mile Circle.

12. In particular, the Program issued a 1982 Waterfront Development permit for the Dupont facility in Carneys Point (Agency File Number 82-0519-1). This permit was for dredging of the berth area of an existing pier and authorized dredging at least 200 feet beyond the mean low water line within the Twelve Mile Circle.

13. In 1991, the Program issued to Keystone Cogeneration Systems Inc. in Logan Township stream encroachment, waterfront development and freshwater wetlands permits and a Water Quality Certificate (Agency File Numbers 0809-91-0010.1, 0010.2, 0010.3 and 0010.6) for a coal unloading facility and the approach-way pier. These facilities have a

combined length of approximately 1700 feet, and extend beyond the low water line within the Twelve Mile Circle, at a point where the Delaware River is approximately 4000 feet wide. The coal unloading pier is approximately 2300 feet from the main shipping channel of the river and 150 feet from the Marcus Hook Authorized Anchorage line. The State of Delaware also asserted jurisdiction and issued permits for this project.

14. In 1996, the Program issued a Waterfront Development permit to the Department's Division of Parks and Forestry for the rehabilitation of a pier at Fort Mott State Park in Elsinboro Township (Agency File Number 1708-95-0014.1). The pier extends 350 feet waterward of the high water line into the Delaware River. The New Jersey permit required approval by the State of Delaware for the installation of floating ferry mooring associated pilings and removal of rip-rap against the crib structure below mean low water. New Jersey's DEP application (dated September 19, 1995) indicates that it would apply to the Delaware Department of Natural Resources and Environmental Control.

15. In 2000, the Program issued to Pennsville Township a Waterfront Development permit for repairs and replacement to a municipal boat-ramp (Agency File Number 1708-00-0001.1, 1.2). At the boat-ramp location, mean low water is approximately 60 feet from the bulkhead and the ramp extends at least 30 feet beyond the mean low water line within the Twelve Mile Circle.

Appendix 9

16. In 2001, the Program issued a Waterfront Development permit to Pennsville Township (Agency File Number 1708-01-0004.1), for installation of over 100 feet of stormwater force main pipes. The permitted improvements extend through the intertidal beach area to approximately 9 feet beyond the mean low tide line within the Twelve Mile Circle.

17. The above statements are true to the best of my knowledge and I am aware I am subject to penalties for any knowingly false statements contained herein.

/s/
Kevin J. Broderick, Manager
Bureau of Coastal Regulation
Land Use Regulation Program
New Jersey Department of Environmental Protection
501 East State Street
P.O. Box 439
Trenton, New Jersey 08625-0439
(609) 984-3444

Sworn and
subscribed before me on
this 16th day of June, 2005

Lewin Weyl
Attorney at Law
State of New Jersey

APPENDIX 10 — AFFIDAVIT OF STEVEN C. WHITNEY, DATED JULY 27, 2005

NO. 11, ORIGINAL

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF STEVEN C. WHITNEY IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

Steven C. Whitney, of Little Deer Isle, Maine, of full age, being duly sworn according to law hereby deposes and says:

1. I am retired from a twenty-seven year career at the New Jersey Department of Environmental Protection ("DEP") from 1970 to 1997.

2. From January 1975 to July 1979, I served as Supervisor in the Office of Coastal Zone Management in the Division of Coastal Resources. The office implemented and administered New

Jersey's Coastal Area Facilities Review Act, N.J. Stat. Ann. 13:19-1 to -33, first effective September 18, 1973. During that time, I was part of the staff that prepared the New Jersey Coastal Management Program and Final Environmental Impact Statement (August 1980) ("1980 CMP"). New Jersey's CMP was adopted in two segments. In 1978, New Jersey adopted a CMP for the Bay and Ocean Shore (1978 CMP). With respect to the area known as the Twelve Mile Circle, the 1978 CMP stated that continued coordination and work toward appropriate agreements between the coastal management programs of the two states would be required to resolve potential conflicts between the coastal policies of New Jersey and Delaware. (1978 CMP at 19.) In 1980, New Jersey adopted a revised CMP, which also covered waterfront areas along New Jersey's tidally influence waterways. (1980 CMP).

3. The 1980 CMP was an extensive document, covering many issues. With respect to the area known as the Twelve Mile Circle, the 1980 CMP stated that New Jersey and Delaware coastal management agencies had discussed the boundary issue and concluded that ". . . any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." (1980 CMP, page 20). However, as set

forth below, the States were unable to reach any final agreement about how to accomplish this. Further, during my term of service with the DEP, to my knowledge, New Jersey never adopted any regulation requiring any person seeking to construct an improvement appurtenant to the New Jersey side of the River to obtain any permit or approval from the State of Delaware.

4. From July 1979 to June 1988, I served as Chief of the Bureau of Planning and Project Review in the Division of Coastal Resources. Then, from June 1988 to July 1991, I served as Assistant Director of the Division of Coastal Resources. From July 1991 to January 1997, I served as Manager, Environmental Planning, Coastal/Land Planning Group.

5. In these capacities, I participated in discussions with the Coastal Management Program regulatory and planning staffs about the New Jersey/Delaware boundary line and what effects it had on permit decision-making. I also participated in other discussions and conferences with Delaware staff which addressed these topics.

6. The 1978 and 1980 CMPs and the discussions which followed led my office to develop between 1991 and 1994 a draft Memorandum of Agreement between New Jersey and Delaware. The purpose of the MOA was to establish a framework within which the DEP and Delaware's Department of Natural Resources and Environmental Control could share relevant

information regarding specified regulatory programs and actions along the States' common boundary within the Twelve Mile Circle.

7. The June 16, 1994 draft MOA would have provided that New Jersey and Delaware would share information concerning relevant applications and concerning proposed relevant rulemaking, and that the States would agree to work together to resolve inconsistencies between the Programs. In addition, the draft MOA stated that each agency had "the independent authority to approve or deny applications pursuant to its own regulations."

8. However, during the review process of the draft MOA within DEP, objections were raised. In general, there were concerns about becoming involved in an overly cumbersome approval process, and about giving a veto to Delaware as to projects that otherwise would have met New Jersey standards. As a result, in 1994, New Jersey abandoned efforts to reach an agreement on these matters.

9. The above statements are true to the best of my knowledge, and I am aware I am subject to penalties for any knowingly false statements contained herein.

/s/
Steven C. Whitney
27 Mourning Dove Lane
Little Deer Isle, ME 04650

Appendix 10

Sworn and subscribed before
me on this 27 day of July 2005

_____/s/_____
Myra P. Weed
Notary Public of the
State of Maine

APPENDIX 11 — AFFIDAVIT OF JEANNE M. FOX, DATED JUNE 20, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF JEANNE M. FOX IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Essex :

Jeanne M. Fox, being duly sworn upon her oath, hereby deposes and states the following:

1. I am the President of the New Jersey Board of Public Utilities (Board). I am fully familiar with the matters stated herein.

2. The Board is charged by statute with the supervision and regulation of all public utilities in the State of New Jersey. *N.J.S.A.* 48:2-13. The Board is responsible for ensuring that the public utilities provide safe, adequate and proper service. In addition, the Board must set just and reasonable rates. *N.J.S.A.* 48:2-21.

3. By application dated September 16, 2004, Crown Landing, LLC, filed at the Federal Energy Regulatory Commission (FERC) for authorization to site, construct and operate a liquefied natural gas (LNG) import facility in Logan Township, New Jersey.

4. By application dated February 17, 2004, Texas Eastern Transmission, LP (Texas Eastern), filed at FERC for authorization to construct, own, operate and maintain pipeline facilities and related appurtenances to interconnect its pipeline system with the proposed LNG facility.

5. The proposed LNG terminal would consist of facilities capable of unloading LNG ships and storing up to 450,000 cubic meters of LNG (9.2 billion cubic feet of natural gas equivalent). The terminal would include facilities for vaporizing the LNG and sending out natural gas at a baseload rate of 1.2 billion cubic feet per day (Bcfd) and a maximum rate of 1.4 Bcfd.

6. Crown Landing proposes to interconnect the LNG facilities onsite with three pipelines. One interconnect would be with the new pipeline that Texas Eastern proposes to construct and operate between its existing Chester Junction facility in Brookhaven Borough, Pennsylvania and the

proposed LNG terminal (Logan Lateral). The other two interconnects would be with existing pipelines that currently cross the LNG site and are operated by Columbia Gas Transmission Company (Columbia Gas) and Transcontinental Gas Pipe Line Corporation (Transco), respectively. The Crown Landing LNG facility would have a maximum capacity of 0.5 Bcfd to the Columbia Gas pipeline system, 0.6 Bcfd to the Transco pipeline system, and 0.9 Bcfd to the Texas Eastern pipeline system.

7. North America holds 4% of the world's natural gas proven reserves but consumes over 30% of the world's natural gas. The remaining 96% of the world's natural gas reserves are located in other countries; the Logan Township facility would receive and unload LNG from around the world.

8. The LNG terminal and the proposed pipeline facilities would provide much needed gas supply to the capacity-constrained Northeast, where FERC has stated that LNG now comprises 2% of the natural gas used and could provide up to 17% of natural gas by 2025.

9. In particular, the Logan Lateral pipeline will provide up to 900,000 decatherms per day (Dth/d) of direct access to significant supplies of competitively priced and clean burning natural gas into the eastern portion of Texas Eastern's pipeline system. This additional supply and capacity should help to mitigate the recent volatility of natural gas prices. This additional gas supply and capacity will serve the growing demand in the mid-Atlantic region, including New York, New Jersey, Pennsylvania, Delaware and Maryland, as well as in the Northeast. This additional access will provide shippers

on the Texas Eastern and other interconnecting pipeline systems with an additional supply alternative, and thus enhanced reliability of supply.

10. Texas Eastern states that this new supply will enhance operational flexibility and reliability during peak demand periods and during scheduled maintenance. Scheduled maintenance is expected to increase as a result of new pipeline safety requirements.

11. LNG becomes economically competitive to domestic gas supply when the retail price of domestic gas rises above $3.50 per million British thermal units (MBtu), which is well below the current spot and futures prices. The composite spot price for natural gas on the wholesale market has risen from $2.16 per ten thousand million British thermal units (MMBtu) in 1999 to $5.77/MMBtu in 2004. Current projections for 2005 are in the range of $6.75/MMBtu. New York Mercantile Exchange (NYMEX) natural gas futures have similarly risen from $2.27/MMBtu in 1999 to $6.14/MMBtu in 2004, with 2005 projections being $6.55/MMBtu. NYMEX closed on May 25, 2005 at $6.31/MMBtu.

12. New Jersey is a consuming state, meaning that we do not have any natural energy resources. With respect to natural gas, the State is primarily dependent on interstate pipelines to deliver our natural gas supply. Southern New Jersey is even more dependent on this mode of transportation as it is bounded on three sides by water. This area of our State is served exclusively by South Jersey Gas Company (SJG). Approximately 313,000 residential, commercial and industrial customers receive their natural gas from SJG. The

area continues to experience an increased demand of about 3% per year for natural gas due to new construction and existing home conversions from electric or oil heat to natural gas.

13. SJG receives its natural gas supply from only two interstate pipeline systems, while northern New Jersey enjoys much greater access to pipelines. The southern area is more vulnerable to service interruptions should problems with one or both of the two transmission systems occur.

14. When one or both transmission systems experience a failure of supply such that they are unable to meet their firm contractual obligations, SJG purchases gas on the open market, which typically results in increased prices.

15. The New Jersey Board of Public Utilities supports increases in sources of supply, especially since New Jersey, and in particular southern New Jersey, is in a growth mode. Assuming all environmental and safety concerns are properly addressed, the proposed LNG facility would provide another source of natural gas, which is vital to our State since North American production is forecast to decline over the next twenty years, and adequate pipeline capacity to access the Alaskan reserves does not yet exist. The proposed LNG facility, if built with appropriate safeguards for our environment and our security, would provide additional gas from diverse areas which should increase reliability and promote greater competitiveness in pricing.

Appendix 11

_____/s/_____
JEANNE M. FOX
President
New Jersey Board of Public Utilities
2 Gateway Center
Newark, New Jersey 07102
(973) 648-2026

Subscribed and sworn
to before me this
20th day of June, 2005

_____/s/_____
Teresa M. Sellmeyer
Notary Public of the
State of New Jersey

APPENDIX 12 — AFFIDAVIT OF AMY DONLON, DATED JULY 25, 2005

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

AFFIDAVIT OF AMY C. DONLON IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

State of New Jersey:
SS
County of Mercer :

I, AMY C. DONLON, being duly sworn according to law, upon her oath, deposes and says:

1. I am over eighteen years of age, and I have personal knowledge of the facts stated in this Affidavit.

2. I am a Deputy Attorney General for the State of New Jersey.

3. On May 17, 2005, I sent a Freedom of Information Act ("FOIA") Request, pursuant to the Delaware Freedom of Information Act, Del. Code Ann. tit. 29, § 10001 (2005), to Laurie Moyer, Paralegal, State of Delaware, Division of Water Resources, Department of Natural Resources & Environmental Control ("DNREC"). My FOIA request sought, in part, records from DNREC relating to coastal zone permits and/or subaqueous lands permits applied for by any person, or issued to any person, for activities within the Twelve-Mile Circle around New Castle, Delaware. A copy of this letter is attached as **Exhibit A**.

4. On June 10 and 24, 2005, I received copies of records from DNREC in response to my FOIA request. These records related to both subaqueous land permits and leases issued by DNREC pursuant to the Delaware Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the "DSLA"), and applications submitted to DNREC pursuant to the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the "DCZA"). The geographic scope of the records provided by DNREC was limited to: "the New Jersey side of the Delaware River, i.e., from the main channel of the Delaware River to the New Jersey shoreline, within the Twelve-Mile Circle." See copy of May 31, 2005 letter attached as **Exhibit B**.

Appendix 12

The DSLA Records

5. Specifically, with regard to leases and permits applied for and/or issued pursuant to the DSLA, DNREC provided copies of its records relating to five utilities that had installed or proposed to install submerged utility pipelines across the Delaware River between Delaware and New Jersey within the Twelve-Mile Circle. These utilities included: Columbia Gas Transmission Corp.; AT&T; Colonial Pipeline Co.; Delmarva Power & Light Co./ Connectiv Communications, Inc.; and Sunoco Inc.

6. Further, in addition to the cross-River utility pipelines described above, with regard to leases and permits applied for and/or issued pursuant to the DSLA, DNREC provided copies of its records relating to six properties:

(a) the E.I. Du Pont De Nemours & Co., Chambers Works facility, located in Deepwater, Pennsville Township, New Jersey ("DuPont");

(b) the Keystone Cogeneration System, Inc. located in Logan Township, Gloucester County, New Jersey ("Keystone/ Logan");

(c) Fort Mott State Park, located in Salem County, New Jersey;

(d) Fenwick Commons, LLC, proposed project location in Penns Grove, Salem County, New Jersey;

(e) Crown Landing, LLC, proposed location in Logan Township, Gloucester County, New Jersey; and

(f) Allied Chemical Corp. located in Claymont, Delaware.

Appendix 12

DuPont

7. With regard to DuPont, the FOIA response included a carbon copy of a September 30, 1957 letter from Alan L. Skinner, Esq. ("Mr. Skinner"), of the DuPont Legal Department, to R.A. Haber, Chief Engineer of the Delaware State Highway Department. A copy of this letter is attached as **Exhibit C**. This letter states that Delaware did not have authority under Article VII of the "Treaty of 1905" to insist on Delaware approval as a condition of the issuance of a permit by the United States Army Corps of Engineers for a structure on the New Jersey side of the River within the Twelve-Mile Circle and that "[t]his is a case of first instance with us[.]"(*Id.*) The letter further stated:

> It is our opinion that, pursuant to the terms of the above mentioned Treaty of 1905 and the U.S. Supreme Court decision of 1933 [sic], the State of New Jersey is the proper authority with which we should deal in connection with any lands lying under the Delaware River, but on the New Jersey side of the River and within the 12-mile circle. (*Id.*)

8. Also included in the FOIA response were copies of several letters reflecting the response of the Delaware State Highway Department to Mr. Skinner's September 30, 1957 letter.

(a) On October 25, 1957, R.A. Haber ("Mr. Haber") of the Delaware State Highway Department wrote to Mr. Skinner that the Department had approved the proposed

DuPont outfall and that "[t]he Department further directed that your letter of September 30th be forwarded to our Attorney, and that he be asked to contact you directly to determine if possible the future status of such requests." A copy of this letter is attached as **Exhibit D**. The Department's attorney, S. Samuel Arsht ("Mr. Arsht"), was identified as a "cc" on this letter.

(b) On December 2, 1957, Mr. Arsht wrote to Mr. Haber, with a "cc" to Mr. Skinner, that he "concur(red) in Mr. Skinner's opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933, [sic] the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle." A copy of this letter is attached as **Exhibit E.** Mr. Arsht further recommended that the Delaware State Highway Department notify the U.S. Army Corps of Engineers "that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required." (*Id.*)

(c) On January 8, 1958, Mr. Arsht wrote to Mr. Skinner advising that the Delaware State Highway Department had adopted a resolution on December 11, 1957, which resolution, according to the letter, stated as follows:

> On motion duly made, seconded and carried, the Department, taking cognizance of the above

> opinion (of S. Samuel Arsht, Department Attorney, to Mr. R.A. Haber, Chief Engineer, dated December 2, 1957), directed the Chief Engineer to notify the Corps of Engineers, U.S. Army, that while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted.

A copy of this letter is attached as **Exhibit G**.

(d) The letter from Mr. Arsht to Mr. Skinner of January 8, 1958 enclosed a letter dated December 13, 1957, from Mr. Haber to the U.S. Army Corps of Engineers. A copy of this December 13, 1957, letter is attached as **Exhibit F.** In it, Mr. Haber wrote that the Delaware State Highway Department had decided to continue requesting information from the U.S. Army Corps of Engineers regarding "proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers permit be held up or otherwise delayed" if Delaware failed "to act upon it." (*Id.*) The letter advised, by contrast, that "[i]f any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department." (*Id.*)

9. Also included in the FOIA response was a February 10, 1971 letter from Mr. Skinner to Mr. John C. Bryson, Director of Environmental Control Division, Department of Natural Resources of the State of Delaware, disputing the necessity of entering into a subaqueous lease with Delaware in order

for DuPont to construct a fuel oil storage tank appurtenant to the New Jersey shoreline. The letter of February 10, 1971 is attached as **Exhibit H**. Mr. Skinner wrote: "This question of jurisdiction is not new to us, having been raised in 1957 by R.A. Haber, Chief Engineer of the Delaware State Highway Department. At that time, it was determined that the State of Delaware had no jurisdiction in such matters on the easterly side of the Delaware River." (*Id.*) Mr. Skinner attached copies of previous correspondence dated December 2, 1957, and January 8, 1958, from Mr. Arsht, attorney for the Delaware State Highway Department.

10. Also included in the FOIA response was a letter dated June 7, 1971, from E.T. Fogg, Works Engineer for DuPont, to B.E. Lane, of the Delaware Water and Resources Commission. A copy of this letter is attached as **Exhibit I**. This letter was written in connection with an application for permission to construct a tanker unloading and oil storage facility on riparian lands on the New Jersey side of the River within the Twelve-Mile Circle. The letter stated:

> It is DuPont's position that the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty. It was in reliance on the Treaty that the DuPont Company purchased the lands in question from the State of

> New Jersey in 1916. . . . The application is therefore filed with the understanding that such filing is without prejudice to either DuPont or the State of Delaware with regard to any questions that might arise as to the adequacy of DuPont's title, and that payment of dredging and lease charges shall be reserved. (*Id.*)

11. Also included in the FOIA response was a September 29, 1971 subaqueous lands lease issued to DuPont by Delaware. This lease is attached as **Exhibit J**. In the lease, Delaware agreed to defer collection of $60,647 in leasing fees, and DuPont agreed to pay the leasing fees plus 6% interest "in the event that the disputed title to the subaqueous lands in question is resolved in favor of [Delaware] at some future date under a final judgment of a federal court of competent authority." (*Id.*).

12. Also included in the FOIA response was a copy of a letter dated October 23, 1981, from June D. MacArtor, Deputy Attorney General, State of Delaware, to Mr. Skinner indicating that "the $60,647.00 plus 6% interest from September 29, 1971 is presently due and owing." This October 23, 1981 letter is attached as **Exhibit K**.

13. Also included in the FOIA response was a copy of the response letter dated October 27, 1981, from Mr. Skinner to Deputy Attorney General MacArtor. This October 27, 1981 letter is attached as **Exhibit L**. The letter enclosed previous correspondence between DuPont and Delaware from 1957 and 1958 concerning the Compact of 1905. Mr. Skinner again

concluded: "It is my opinion that New Jersey has jurisdiction over the matters covered by the 1971 lease as previously agreed to by S. Samuel Arsht, Esq., and the Delaware State Highway Department." DNREC produced no documents in response to my FOIA request indicating that its lease dispute with DuPont was resolved or that DuPont paid the lease payments to Delaware.

14. Also included in the FOIA response was a Letter of Authorization dated March 18, 1982, from DNREC to DuPont for the reconstruction of a subaqueous lands structure.

15. Also included in the FOIA response was a letter dated October 15, 1982, from DNREC to DuPont authorizing maintenance dredging in the Delaware River.

16. Also included in the FOIA response was a letter dated January 5, 1987, from DNREC to DuPont authorizing repair work to a subaqueous structure.

17. Also included in the FOIA response from DNREC was a Subaqueous Lands Permit issued May 4, 2001, allowing DuPont "to dredge approximately 4,650 cubic yards of material and to backfill to existing elevations in a 0.71 acre site in the Delaware River; and to install a temporary sheet pile wall surrounding the excavation in the Delaware River, near Deepwater, New Jersey, in New Castle County, Delaware."

Appendix 12

Keystone/Logan

18. With regard to Keystone/Logan, the FOIA response included a copy of a DNREC subaqueous lands lease issued to Keystone/Logan on September 30, 1991, "for the construction of an industrial pier on public subaqueous lands and to conduct dredging in the Delaware River at Logan Township, Gloucester County, New Jersey, Route 130, Lot No. 2, Block No. 1 and Brandywine Hundred, New Castle County, Delaware."

19. Also included in the FOIA response was a copy of a DNREC subaqueous lands lease issued to Keystone/Logan on November 9, 2001, "to maintain two 25 foot by 25 foot mooring dolphins, six 16 foot by 16 foot breasting dolphins, a 70 foot by 105 foot dock, a 22 foot by 450 foot pier, four 4 foot by 109 foot dock sections, two 4 foot by 104.5 foot dock sections, two 2 foot by 4 foot dock sections, and a 10 foot by 10 foot loading platform in the New Castle County, Delaware section of the Delaware River, adjacent to Logan Township, Gloucester County, New Jersey."

Fort Mott

20. Also included in the FOIA response was a copy of a DNREC subaqueous lands lease issued to the State of New Jersey Department of Environmental Protection Division of Parks and Forestry on February 2, 1996, "for the re-construction of a pier to include placement of a barge 30 feet by 100 feet and a pile-supported platform 10 feet by 10 feet on the Delaware River in New Castle County, Delaware, adjacent to New Jersey's Fort Mott State Park, Salem County, New Jersey." The primary purpose of this project was the "[h]istoric restoration of Pier and introduction of ferry service

between Fort Mott and Fort Delaware and Fort DuPont," according to the September 22, 1995 application, which was also included in the FOIA response.

Fenwick Commons

21. Also included in the FOIA response was a copy of a DNREC subaqueous lands lease issued to Fenwick Commons, LLC, on May 10, 2005, "to construct a 40 foot wide by 750 foot long pier, a 6 foot wide by 95 foot long aluminum gangway, a 28 foot wide by 120 foot long floating dock and breakwater, 6 support pilings, 1255 linear feet of steel bulkhead and to fill approximately 1882 square feet of public subaqueous lands at the Penns Grove Riverfront and Pier, end of West Main Street, Penns Grove, New Jersey." Also included was a January 15, 2005 "federal consistency certification" from DNREC indicating that the Fenwick Commons project was consistent with Delaware's coastal zone management plan based upon receipt of a DSLA permit.

22. Also included was a letter dated May 6, 2005 from Warren H. Carr, General Counsel, Fenwick Commons, to John A. Hughes, Secretary, DNREC, enclosing Fenwick Commons' subaqueous lands lease and lease fee, and stating:

> Financing considerations compel us to execute this document, however, with a notation that the issue as to the ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey. We are however, returning the documents in completed form, together with the appropriate fee, in order that we may proceed with the Riverwalk project at Penns Grove, New Jersey. Our position is that we will leave the issue of

> riparian rights and Delaware ownership to be resolved at a different time and in a different form [sic]. We do not acknowledge by this document, the issue of ownership.

This May 6, 2005 letter is attached as **Exhibit M.**

Crown Landing

23. Also included in the FOIA response from DNREC was a copy of Crown Landing's application for a DSLA permit, dated September 27, 2004; a copy of a letter from DNREC to Crown Landing dated October 29, 2004, requesting Crown Landing to withdraw its DLSA permit application until the conclusion of the coastal zone status decision process; a letter dated November 4, 2004, by which Crown Landing withdrew its DLSA permit application; and a letter from DNREC to Crown Landing dated November 5, 2004, indicating that Crown Landing's DSLA application file had been closed.

Allied Chemical

24. Also included in the FOIA response was a copy of an authorization letter dated September 13, 1979 from DNREC to Allied Chemical allowing for the reconstruction and replacement of existing subaqueous lands structures offshore of Claymont, Delaware.

The DCZA Records

25. With regard to permits or applications submitted pursuant to the DCZA, DNREC provided copies of two sets of records.

Appendix 12

26. Specifically, DNREC provided a copy of a DCZA permit issued to Keystone/Logan on December 13, 1991, permitting: "Construction and utilization of a 225 MW cogeneration power plant with pier for off-loading of coal and a water intake structure for the sole use of the power plant."

27. The FOIA response also included a copy of DNREC's Legal Notice acknowledging receipt of a request for a DCZA status decision from Crown Landing and seeking public comments. The application itself was not included. A copy of the DCZA status decision dated February 3, 2005, indicating that Crown Landing's proposed project was prohibited under the DCZA, was also included.

_____/s/_____
Amy C. Donlon
Deputy Attorney General
State of New Jersey
Office of the Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street
Post Office Box 112
Trenton, New Jersey 08625-0093
(609) 633-0651

Subscribed and sworn
to before me this
25th day of July, 2005

_____/s/_____
Ruth M. Wells
Notary Public of the
State of New Jersey

APPENDIX 13 — AFFIDAVIT OF AMY DONLON, EXHIBIT A - FREEDOM OF INFORMATION REQUEST, DATED MAY 17, 2005

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0093

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

May 17, 2005

Director's Office - FOIA Staff
Attn. Laurie Moyer, Paralegal
Division of Water Resources
Department of Natural Resources & Environmental Control
89 Kings Highway
Dover, DE 19901

Via facsimile at (302) 739-7864 and first class mail

Re: Freedom of Information Act Request

Dear Ms. Moyer:

Pursuant to the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001 *et seq.*, please provide copies of the following documents and records from the Delaware

Appendix 13

Department of Natural Resources & Environmental Control, or allow me to inspect the originals, as soon as possible but no later than within the next 20 business days:

1. All files and documents relating to any subaqueous lands permits applied for, requested by or issued to any person for any activities within the Twelve-Mile Circle around New Castle, Delaware; and

2. All files and documents relating to any coastal zone permits applied for, requested by or issued to any person for any activities within the Twelve-Mile Circle around New Castle, Delaware; and

3. All files and documents relating to Delaware's assertion of jurisdiction over any project or activity appurtenant to the New Jersey shoreline within the Twelve-Mile Circle around New Castle, Delaware, including, but not limited to subaqueous lands and coastal zone regulation.

Please include all documents created through the date of your response. I will pay any copying and administrative fees associated with your response to this request; however, please notify me if those fees will exceed $100.00.

The records should be sent to my attention at the above address. If you are not the appropriate person to process this request, please immediately forward this request to the person(s) who can assist in producing the records.

Appendix 13

If you have any questions regarding this request, please call me at (609) 633-0651. Thank you for your kind attention to this letter.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: s/ Amy C. Donlon
Amy C. Donlon
Deputy Attorney General

APPENDIX 14 — AFFIDAVIT OF AMY DONLON, EXHIBIT B - MAY 31, 2005 FREEDOM OF INFORMATION ACT LETTER

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0093

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

Via facsimile at (302) 577-8500 and (302) 739-6727
Kevin P. Maloney, Deputy Attorney General
State of Delaware, Department of Justice
820 N. French Street
Wilmington, DE 19801

Re: May 17, 2005 Freedom of Information Act Request

Dear Mr. Maloney:

I am in receipt of your letter from today memorializing my agreement to limit the geographic scope of my May 17, 2005 Freedom of Information Act request for records from the Delaware Department of Natural Resources & Environmental Control. As we had discussed, I agree to limit my request to the "New Jersey side" of the Delaware River, i.e., from the main channel of the River to the New Jersey shoreline, within the Twelve-Mile Circle.

Appendix 14

If this is not your understanding of my request, please call me at (609) 633-0651. I will contact you tomorrow at your Dover office to determine the volume of the response to my request. Thank you for your kind attention to this letter.

Sincerely yours,
PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

BY: s/ Amy C. Donlon
Amy C. Donlon
Deputy Attorney General

cc: Kevin Donnelly, Director; and
Laurie Moyer, Paralegal via facsimile
at (302) 739-7864

APPENDIX 15 — AFFIDAVIT OF AMY DONLON, EXHIBIT C – SEPTEMBER 30, 1957 LETTER FROM MR. SKINNER (DUPONT) TO MR. HABER (DELAWARE STATE HIGHWAY DEPARTMENT)

DUPONT
ESTABLISHED 1802
E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED
WILMINGTON 98, DELAWARE

LEGAL DEPARTMENT September 30, 1957

Mr. R. A. Haber
Chief Engineer
Delaware State Highway Department
Dover, Delaware

Dear Mr. Haber:

We have filed an application with the United States Corps of Engineers for a permit for the installation of certain facilities in the bed of the Delaware River on the New Jersey side of said River and within the 12-mile circle which delineates the Delaware boundary, and, in a discussion concerning said application, we were informed by Mr. Moritz of the Philadelphia Office of the U. S. Corps of Engineers that if our application were in order the permit would be granted upon our obtaining the prior approval of the State Highway Department of the State of Delaware. This requirement, as I understand, was the result of a request by the State Highway Department of the State of Delaware to the U. S. Corps of Engineers that, before any such permit be granted for installation on Delaware owned land, such approval be required.

Appendix 15

This is a case of first instance with us inasmuch as throughout a long period of years we have made many purchases of land under the waters of the Delaware River, situate within the State of Delaware but on the New Jersey side of the River and within the 12-mile circle, and in some instances we have made installations thereon under proper permits obtained from the U. S. Corps of Engineers without the necessity of obtaining approval by the State of Delaware, it being the position of all parties concerned, until now, that New Jersey was the proper authority with which to deal in connection with such matters on the New Jersey side of the River and within the 12-mile circle, because of the Treaty of 1905 between the State of New Jersey and the State of Delaware, reported at 52 N.J.S.A. 28-34, Article 7 of which reads as follows:

> "Article 7. Each state may on its own side of the River continue to exercise riparian jurisdiction of every kind and nature and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states".

This treaty was the result of a long-standing conflict between the two states regarding the actual boundary between them and was followed in 1933 by a United States Supreme Court decision in the case: *State of New Jersey v. State of Delaware*, reported in 291 U.S. 361-365, which held, among other things, as follows:

> "Within the 12-mile circle the River and the subaqueous soil thereof up to the low water mark on the easterly or New Jersey side will be adjudged

to belong to the State of Delaware, subject to the Compact of 1905."

It is our opinion that, pursuant to the terms of the above mentioned Treaty of 1905 and the U. S. Supreme Court decision of 1933, the State of New Jersey is the proper authority with which we should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the River and within the 12-mile circle.

It would be appreciated if you would review this matter and notify us as soon as possible of the position your Department will take insofar as the present and future similar applications are concerned. It is suggested that in the event it is determined that the State of Delaware has no jurisdiction in such matters, you notify the U. S. Corps of Engineers by letter, with a copy to E. I. du Pont de Nemours and Company, attention of the writer, that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the 12-mile circle, and that the prior approval of the State of Delaware in such matter is not required.

Yours very truly,

ALAN L. SKINNER
Of Counsel

APPENDIX 16 — AFFIDAVIT OF AMY DONLON, EXHIBIT D – OCTOBER 25, 1957 LETTER FROM MR. HABER TO MR. SKINNER

STATE OF DELAWARE

STATE HIGHWAY DEPARTMENT
P.O. Box 151
DOVER, DELWARE

October 25, 1957

Mr. Alan L. Skinner
E. I. duPont DeNemours & Company
Wilmington, 98, Delaware

Dear Mr. Skinner:

At the October 18th meeting of the State Highway Department, permission was granted to place the new outfall from the Deep-water Plant. This approval is in accordance with the present policy of the State Highway Department.

The Department further directed that your letter of September 30th be forwarded to our Attorney, and that he be asked to contact you directly to determine if possible the future status of such requests.

Very truly yours,

/s/

R. A. Haber
Chief Engineer

cc:
S. Samuel Arsht, Esq.
Corps of Engineers

APPENDIX 17 — AFFIDAVIT OF AMY DONLON, EXHIBIT E – DECEMBER 2, 1957 LETTER FROM S. SAMUEL ARSHT, ESQ., TO MR. HABER

MORRIS, STEEL, NICHOLS & ARSHT
3018 DuPont Building
Wilmington1, Delaware

December 2, 1957

Mr. R. A. Haber
Chief Engineer
State Highway Department
P.O. Box 151
Dover, Delaware

Dear Mr. Haber:

This will acknowledge receipt of a copy of your letter of October 25, 1957 to Mr. Alan L. Skinner of the DuPont Company (a copy of which went to me and the Corps of Engineers) in which you stated that at the October 18th meeting of the State Highway Department permission was granted to place the new outfall from the Deepwater Plant and that such approval is in accordance with the present policy of the State Highway Department. You also stated in your letter that I had been requested by the Department to contact Mr. Skinner directly to determine, if possible, the future status of similar requests.

I have considered Mr. Skinner's letter to you of September 30, 1957 in which he refers to the Treaty of 1905 between New Jersey and Delaware and to the decision of the United States Supreme Court of 1933 in the case of *State of New Jersey v. State of Delaware*, reported in 291 U.S. 361-5.

Appendix 17

I concur in Mr. Skinner's opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933, the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle.

In view of my concurrence in Mr. Skinner's opinion regarding the jurisdiction of the State of Delaware, I suggest that the State Highway Department notify the U.S. Corps of Engineers by letter, with a copy to E.I. duPont de Nemours & Company, attention Mr. Alan L. Skinner, Legal Department, that the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required.

Very truly yours,

/s/

S. SAMUEL ARSHT

cc: Alan L. Skinner, Esquire

APPENDIX 18 — AFFIDAVIT OF AMY DONLON, EXHIBIT F - DECEMBER 13, 1957 LETTER FROM MR. HABER TO U.S. ARMY CORPS OF ENGINEERS

December 13, 1957

U.S. Army, Corps of Engineer
Office of the District Engineer
Philadelphia District
P.O. Box 8629
Philadelphia, Pa.

Gentlemen:

At the December 11th meeting of the Delaware State Highway Department it was determined that the Corps of Engineers be requested to continue to supply the Delaware State Highway Department with information regarding proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers be held up or otherwise delayed by failure of the Delaware State Highway Department to act upon it.

If any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department.

Your cooperation in keeping us supplied with the information on the proposed work will be very much appreciated.

Very truly yours,

R.A. Haber
Chief Engineer

cc:
Mr. Hugh B. Sharp, Jr.
Mr. Joe S. Robinson
Mr. Samuel S. Arsht

APPENDIX 19 — AFFIDAVIT OF AMY DONLON, EXHIBIT G - JANUARY 8, 1958 LETTER FROM S. SAMUEL ARSHT, ESQ., TO MR. SKINNER

LAW OFFICES
OF
MORRIS, STEEL, NICHOLS & ARSHT
Du Pont Building
Wilmington1, Delaware

January 8, 1958

Alan L. Skinner, Esquire
E. I. du Pont de Nemours & Co.
Legal Department
DuPont Building
Wilmington, Delaware

Dear Alan:

In accordance with our telephone conversation of this morning, I enclose herewith a copy of a letter dated December 13, 1957 from Mr. R. A. Haber, Chief Engineer of the Highway Department, to the Corps of Engineers, United States Army, that was written pursuant to the following resolution adopted by the Highway Department at its meeting held on December 11, 1957:

> "On motion duly made, seconded and carried, the Department, taking cognizance of the above opinion (of S. Samuel Arsht, Department Attorney, to Mr. R. A. Haber, Chief Engineer, dated December 2, 1957), directed the Chief Engineer to notify the Corps of Engineers, U.S. Army, that

while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted."

Very truly yours,

/s/

S. SAMUEL ARSHT

Enc.

APPENDIX 20 — AFFIDAVIT OF AMY DONLON, EXHIBIT H - FEBRUARY 10, 1971 LETTER FROM MR. SKINNER TO JOHN C. BRYSON

DU PONT
E.I. DU PONT DE NEMOURS & COMPANY
INCORPORATED 1802
WILMINGTON, DELAWARE 19898

cc: Mr. F.J. Kelly,
Assistant Chief
Department of Environmental
Protection
Division of Natural Resources
Bureau of Navigation
P.O. Box 1889
Trenton, New Jersey 08625

February 10, 1971

LEGAL DEPARTMENT

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. John C. Bryson
Director of Environmental Control Division
Department of Natural Resources of the
State of Delaware
Dover, Delaware 19901

Re: Permit Application to construct fuel oil storage tank on underwater lands within the State of Delaware at Deepwater Point, New Jersey

Appendix 20

Dear Mr. Bryson:

As I informed you in our telephone conversation of February 9, 1971, we applied to the Corps of Engineers for the above named permit and as a result of such application your Mr. B. E. Lane, Staff Geohydrologist, notified both the Corps of Engineers and our Chambers Works personnel that a permit from the State of Delaware would be necessary and that the project falls within the terms of a moratorium placed on subaqueous lands projects by the Delaware Legislature. We question the jurisdiction of the State of Delaware in this matter.

This question of jurisdiction is not new to us, having been raised in 1957 by R. A. Haber, Chief Engineer of the Delaware State Highway Department. At that time, it was determined that the State of Delaware had no jurisdiction in such matters on the easterly side of the Delaware River.

As background information I am enclosing photocopies of the following letters:

1. Letter dated January 29, 1971 addressed to Mr. P. H. Collins of our Chambers Works by B. E. Lane, Staff Geohydrologist, Water Resources and Subaqueous Lands.

2. Letter dated January 29, 1971 addressed to Colonel Carroll D. Strider, District Engineer, Corps of Engineers by B. E. Lane, Staff Geohydrologist, Water Resources and Subaqueous Lands.

Appendix 20

3. Letter dated September 30, 1957 addressed to R. A. Haber, Chief Engineer of the Delaware State Highway Department by the undersigned.

4. Letter dated October 25, 1957 addressed to the undersigned by R. A. Haber, Chief Engineer of the Delaware State Highway Department.

5. Letter dated December 2, 1957 addressed to Mr. R. A. Haber, Chief Engineer of the Delaware State Highway Department by S. Samuel Arsht, Attorney for the Delaware State Highway Department.

6. Letter dated December 13, 1957 addressed to the United States Army, Corps of Engineers by R. A. Haber, Chief Engineer of the Delaware State Highway Department.

7. Letter dated January 8, 1958 addressed to the undersigned by S. Samuel Arsht, Attorney for the Delaware State Highway Department.

The question was finally resolved on December 11, 1957, by the passage of a resolution by the Delaware State Highway Department directing its Chief Engineer to notify the Corps of Engineers, United States Army that while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted. In my opinion, the language of the 1905 Treaty as confirmed by the decision of the United States Supreme Court will permit no other conclusion. Certainly the unilateral passage of legislation in Delaware or the creation of a new department in charge of subaqueous lands could not change the Treaty.

or alter the court decision so as to affect the division of jurisdiction between the two states.

As I stated to you the moratorium passed by the Delaware Legislature cannot in any event apply to the easterly side of the river, since that statute is limited to the area "between the high and low water marks along the Delaware River and Bay within the State of Delaware." There is no land on the easterly side of the river between the high and low water marks within the State of Delaware.

Our people are very anxious to move on the proposed project. It is immaterial to us whether we get a permit from the State of Delaware or the State of New Jersey, provided it is obtained from the state that actually has jurisdiction of the subject matter, which we believe to be New Jersey.

As you offered to do, it would be appreciated if you would submit this question to the Attorney General of the State of Delaware.

Very truly yours,

s/ Alan L. Skinner
Alan L. Skinner

APPENDIX 21 — AFFIDAVIT OF AMY DONON, EXHIBIT I – JUNE 7, 1971 LETTER FROM E.T. FOGG TO MR. B. E. LANE

DuPONT
Established 1802
E. I. du Pont de Nemours & Company
Incorporated

Chambers Works
Deepwater, New Jersey 08023

Telephone
Area Code 609-299-5000

June 7, 1971

State of Delaware
Water and Air Resources Commission
Water Resources Division
Dover, Delaware 19901

Attention Mr. B. E. Lane, Staff Geohydrologist
Water Resources and Subaqueous Lands

Gentlemen:

Reference E.T. Fogg's letter to B. E. Lane of May 12, 1971, describing the proposed tanker unloading and oil storage facility which Du Pont wishes to construct at its Chambers Works plant located at Deepwater, New Jersey. Enclosed herewith are three completed copies of form WRD-3, 7/69 *Application for State Approval of a Subaqueous*

Lands Project for the proposed facility, and Du Pont Check No. 008-650 in the sum of $25 to cover the application fee.

As you know, the proposed facility, with the exception of a small area to be dredged, will be constructed on subaqueous land which the Du Pont Company has purchased from the State of New Jersey. It is Du Pont's position that the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty. It was in reliance on the Treaty that the Du Pont company purchased the lands in question from the State of New Jersey in 1916. The charges for dredging and filling listed under Item H of the aforesaid application form would compel the Du Pont Company to pay for lease back land which the Company had previously purchased and holds title to under the deeds attached.

We recognized that the State of Delaware's position is that *State of New Jersey v. State of Delaware*, 291 U.S. 361 (1934), conclusively established Delaware's title to the Delaware River and its subaqueous soil up to the mean low water mark on the easterly (New Jersey) side. The application is therefore filed with the understanding that such filing is without prejudice to either Du Pont or the State of Delaware with regard to any questions that might arise as to the adequacy of Du Pont's title, and that payment of dredging and lease charges shall be reserved. The Du Pont Company agrees to pay to the State of Delaware the application for a permit fee of $25 now, and any charges that might be lawfully

due by reason of subject project in the event it is determined at some future date by a court of competent jurisdiction that Delaware's title to the land in question is superior to that of Du Pont's.

We trust that our application is now in order and will be considered by the Water and Air Resources Commission at a special hearing as soon as possible. Feel free to give me a call (AC 609-299-5000 Extension 440) if you should have any questions with regard to this matter.

Very truly yours

/S/

E.T. Fogg
Works Engineer

Enclosures 3 - Completed Form WRD-3, 7/69
1 - Du Pont Check No. 008-650
1 - Copy of Deeds

cc: Mr. J. Bryson
Richard H. Schliem, 3rd, Esquire

APPENDIX 22 — AFFIDAVIT OF AMY DONLON, *EXHIBIT J - 1971 LEASE GRANTED TO DUPONT BY DNREC*

SL-558/1971

LEASE GRANTED TO

E. I. DU PONT DE NEMOURS AND COMPANY

TO

DREDGE, CONSTRUCT A BULKHEAD, FILL BEHIND SAID BULKHEAD, CONSTRUCT A DOCK, AND CONSTRUCT A FUEL OIL STORAGE TANK AT ITS "CHAMBERS WORKS" FACILITY ALONG THE DELAWARE RIVER

AND NOW, to wit, this _____ day of _____, A.D. 1971, the State of Delaware (hereinafter referred to as Lessor) does hereby accept the June 21, 1971, resolution of the Water and Air Resources Commission approving the application of E. I. du Pont de Nemours and Company (hereinafter referred to as Lessee) submitted to the Water and Air Resources Commission and dated June 7, 1971, a copy of which is attached hereto and made a part hereof; and

WHEREAS, Lessor claims title to certain subaqueous lands lying beneath the waters of the Delaware River, the subject matter of this lease; and

WHEREAS, Lessee also claims title to the same subaqueous lands;

Appendix 22

WHEREAS, the granting of this lease is necessary for the construction of certain storage facilities which are necessary for the use of low sulphur fuel, an environmentally desirable goal;

It is understood by both parties to this agreement that both the application for this lease and the granting of this lease are filed and granted without prejudice to the title claim of either party; and

WHEREAS, Lessee, owner of certain lands referred to as the "Chambers Works" and adjacent to the Delaware River, has applied for permission to dredge, construct a bulkhead, fill behind said bulkhead, construct a dock, and construct a fuel oil storage tank on the subaqueous lands adjacent to the "Chambers Works"; and

WHEREAS, pursuant to the provisions of Title 7, Part VII, Section 6451, Delaware Code, the Water and Air Resources Commission finds that it is not contrary to the public interest, and that the granting of this lease is hereby approved subject to the terms and conditions herein set forth.

NOW, THEREFORE, Lessor hereby grants permission to the Lessee to dredge from the Delaware River approximately sixty thousand (60,000) cubic yards of subaqueous material;

AND, to construct approximately nine hundred (900) feet of bulkhead;

Appendix 22

AND, to fill approximately thirty thousand six hundred forty-seven (30,647) square feet of subaqueous land behind said bulkhead;

AND, to construct a six (6) foot by ten (10) foot dock;

AND, to construct a two hundred thousand (200,000) barrel fuel oil storage tank, part of which will be constructed on the aforementioned subaqueous lands, all in accordance with the plans submitted, drawings DWM-1655, DW-22779, DW-22780, and DW-23045, copies of which are attached hereto and become a part hereof;

AND, hereby leases to Lessee the approximately thirty thousand six hundred forty-seven (30,647) square feet of subaqueous land to be filled and the approximately sixty (60) square feet of subaqueous land upon which the six (6) foot by ten (10) foot dock is to be constructed.

THIS lease and authorization shall be continued for a period of ten (10) years beginning the _____ day of _____, 1971, or so long as the conditions attached to the lease are adhered to, whichever is the shorter in time. Upon the expiration of the ten-year term, this lease shall expire and become null and void, unless prior thereto Lessee shall have applied for and received a renewal of this lease. A renewal may be denied if Lessor determines that the lease is no longer in the public interest.

Appendix 22

THIS lease shall be subject to the following conditions:

1. The Lessee agrees to pay the Lessor, subject to the terms of paragraph 1(a) below, thirty thousand dollars ($30,000.00) for the approximately sixty thousand (60,000) cubic yards of subaqueous material to be dredged, thirty thousand six hundred forty-seven dollars ($30,647.00) for a ten-year lease for the approximately thirty thousand six hundred forty-seven (30,647) square feet of subaqueous land to be filled, and an annual rental charge of sixty dollars ($60.00) for a ten-year lease for the approximately sixty (60) square feet of subaqueous land upon which a six (6) foot by ten (10) foot dock is to be constructed.

1(a) Lessee agrees to pay Lessor the amounts, with 6% annual interest from the date of this agreement, as scheduled in the preceding paragraph in the event that the disputed title to the subaqueous lands in question is resolved in favor of Lessor at some future date under a final judgment of a federal court of competent authority. Lessor agrees to defer the collection of the fees, herein referred to, until the title question is resolved as herein agreed.

2. The bulkhead is to be completed prior to any filling of lands contained by said bulkhead.

3. The project is to be undertaken in accordance with the plans submitted. If changes are necessary, revised plans must be submitted and a supplemental approval issued prior to actual construction.

Appendix 22

16. This lease is void if the project has not been initiated by one (1) year from the date of issuance.

17. This lease will be revoked upon violation of any of the above conditions.

IN WITNESS WHEREOF, E. I. du Pont de Nemours and Company has caused this instrument to be executed and its corporate seal affixed by its respective proper officers thereunto duly authorized on this the day and year first above written.

E. I. DU PONT DE NEMOURS AND COMPANY

By /S/

ATTEST:

/S/
Assistant Secretary

IN WITNESS WHEREOF, I /S/, Chairman of the Delaware Water and Air Resources Commission have hereunto set my hand and seal this 17th day of September, 1971.

(SEAL)
By Chairman of Delaware Water and Air Resources Commission

Appendix 22

IN WITNESS WHEREOF, I, RUSSELL W. PETERSON, Governor of the State of Delaware, have hereunto set my hand and the Great Seal of the State of Delaware has been hereunto affixed by the Secretary of State, at Dover, on this 29th day of September in the year of Our Lord One Thousand Nine Hundred and Seventy-one.

/S/ _____ ___ _____
By The Governor

/S/ _ _____ ___ ____
By the Secretary of State

APPENDIX 23 — AFFIDAVIT OF AMY DONLON, EXHIBIT K - OCTOBER 23, 1981 LETTER FROM DELAWARE DAG MacARTOR TO MR. SKINNER

State of Delaware
DEPARTMENT OF JUSTICE
Tatnall Building
P. O. Box 1401
Dover, De. 19901

RICHARD S. GEBELEIN
ATTORNEY GENERAL

736-4636

October 23, 1981

Alan L. Skinner, Esq.
Legal Department
E. I. duPont deNemours & Co.
1007 Market Street
Wilmington, Delaware 19898

Re: Lease No. SL558/1971

Dear Mr. Skinner:

The lease between the duPont Company and the State of Delaware for subaqueous lands beneath the waters of the Delaware River has been referred to me by the Department of Natural Resources and Environmental Control. The terms of the lease include a phrase that your payments will become due and payable when the disputed title to the subaqueous lands is resolved in favor of Lessor under a final judgment of a federal court of competent authority. I think that you will agree that a federal court of competent jurisdiction has

ruled on the subject of the boundary between New Jersey and Delaware. See *New Jersey v. Delaware*, 295 U.S. 694 (copy attached). The court determined that the boundary was the mean low water line on the easterly or New Jersey side.

Please regard this as your official notification that the $60,647.00 plus 6% interest from September 29, 1971 is presently due and owing. May we please receive your check for this amount payable to the State of Delaware.

Thank you for your consideration.

Sincerely,

/s/

June D. MacArtor
Deputy Attorney General

APPENDIX 24 — AFFIDAVIT OF AMY DONLON, EXHIBIT L - OCTOBER 27, 1981 LETTER FROM MR. SKINNER TO DELAWARE DAG MacARTOR

DuPONT
ESTABLISHED 1802
E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED

WILMINGTON, DELAWARE 19898

LEGAL DEPARTMENT October 27, 1981

June D. MacArtor, Esq.
Deputy Attorney General
Department of Justice
State of Delaware
Tatnall Building
P. O. Box 1401
Dover, Delaware 19901

Dear Ms. MacArtor:

Lease No. SL 558/1971

I agree that the two cases, *New Jersey v. Delaware*, 291 U.S. 361 (1933), and *New Jersey v. Delaware*, 295 U.S. 694 (1935), determined that the boundary between New Jersey and Delaware within the 12-mile circle was the low water mark on the New Jersey side; however, the actual holding of the Court was as follows:

> "Within the 12-mile circle the river and subaqueous soil thereof up to low water mark on

the easterly or New Jersey side will be adjudged to belong to the State of Delaware, subject to the Compact of 1905."

The question at the time of the execution of the 1971 lease was the effect of the Compact of 1905. There has been no final judgment of a Federal Court of competent jurisdiction since 1971 determining this matter as required in the lease.

Pursuant to our telephone conversation of yesterday and for your information I have enclosed the following:

1. Copy of letter dated September 30, 1957, addressed by me to Mr. R. A. Haber, Chief Engineer of the Delaware State Highway Department.

2. Copy of letter dated October 25, 1957, addressed to me by R. A. Haber, Chief Engineer.

3. Copy of letter dated December 2, 1957, addressed to Mr. R. A. Haber, Chief Engineer, by S. Samuel Arsht.

4. Copy of letter dated December 13, 1957, addressed by R. A. Haber, Chief Engineer, to the U.S. Army Corps of Engineers.

5. Copy of letter dated January 8, 1958, addressed to me by S. Samuel Arsht.

Appendix 24

6. A copy of my opinion as to the intention and meaning of the Compact of 1905.

It is my opinion that New Jersey has jurisdiction over the matters covered by the 1971 lease as previously agreed to by S. Samuel Arsht, Esq., and the Delaware State Highway Department.

Your comments would be appreciated.

Yours very truly,

/S/

Alan L. Skinner

Enclosures

APPENDIX 25 — AFFIDAVIT OF AMY DONLON, EXHIBIT M - MAY 6, 2005 LETTER FROM WARREN H. CARR, ESQ., TO JOHN A. HUGHES, SECRETARY, DNREC

CRESSE AND CARR
COUNSELLORS AT LAW
39 COOPER STREET
P.O. BOX 357
WOODBURY, NEW JERSEY 08096

856-845-0037

May 6, 2005

FEDEXED 5/6/05
John A. Hughes, Secretary
Depart. Of Natural Resources and
Environmental Control
Division of Water Resources
Wetlands & Subaqueous Lands Section (WSLS)
89 Kings Highway
Dover, Delaware 19901

RE: Application of Fenwick Commons, L.L.C.
Subaqueous Lands Lease No. SL-312/04
Water Quality Certification: WQC-313/04

Dear Mr. Hughes:

Enclosed is the Subaqueous Lands Lease/Water Quality Certification for Fenwick Commons, L.L.C., together with a copy of your letter [not dated] for purposes of your identification. The document has been executed before a

Notary Public of the State of New Jersey, and is being returned with the Lease fee in the amount of $1,000.00 pursuant to your instructions.

Financing considerations compel us to execute this document, however, with a notation that the issue as to the ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey. We are however, returning the documents in completed form, together with the appropriate fee, in order that we may proceed with the Riverwalk project at Penns Grove, New Jersey.

Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different form. We do not acknowledge by this document, the issue of ownership.

Very truly yours,
/s/
Warren H. Carr
General Counsel

Encl. [3 original Lease Documents
Check - $1,000.00]

APPENDIX 26 — DECLARATION OF LAUREN B. SEGAL, DATED JUNE 27, 2005

IN THE SUPREME COURT OF THE UNITED STATES

No. 11, Orig.

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

DECLARATION OF LAUREN B. SEGAL

I, Lauren B. Segal, declare that the following facts are true to the best of my knowledge, information and belief:

1. I am the Vice-President of Crown Landing LLC ("Crown Landing"). Crown Landing is an affiliate of BP America, Inc. ("BP"). I am authorized to execute this Declaration on behalf of Crown Landing and I have personal knowledge of the facts stated herein.

THE PROJECT

2. On September 16, 2004, Crown Landing submitted to the Federal Energy Regulatory Commission ("FERC") an application pursuant to § 3 of the Natural Gas Act to construct

and operate a liquefied natural gas ("LNG") import terminal and re-gasification facility in Logan Township, New Jersey (the "Project"). The Project will be able to deliver a baseload rate of 1.2 billion cubic feet per day of re-gasified LNG to the interstate natural gas pipeline system and will provide a new and reliable source of natural gas for the Mid-Atlantic region, including the States of New Jersey, Delaware, Pennsylvania, New York, and Maryland. The supply is likely to reach other regions through the interstate pipeline grid.

3. Crown Landing is seeking to build this Project to meet the rising domestic demand for natural gas for which current domestic supply sources will not be adequate. *See* Energy Information Administration, *Annual Energy Outlook 2005*, p.6 (DOE/EIA-0383) (February 2005) (available at www.eia.doe.gov/oiaf/aeo/). New sources of natural gas and LNG are particularly needed in the Mid-Atlantic region, where the demand for natural gas is projected to increase significantly over the next two decades. *See* Energy Information Administration, *Supplemental Tables to the Annual Energy Outlook 2005*, Table 2, Energy Consumption by Source and Sector (Middle Atlantic), (February 2005) (available at http://www.eia.doe.gov/ oiaf/aeo/supplement/ suptab_2.xls).

THE PIER IN THE DELAWARE RIVER APPURTENANT TO THE NEW JERSEY SHORELINE

4. The LNG terminal and re-gasification facility will be located entirely within the State of New Jersey. However, the Project also depends on critical riparian facilities located

on the New Jersey side of the Delaware River within the twelve-mile circle around New Castle, Delaware. The 50-foot wide pier will extend from the New Jersey shoreline approximately 2,000 feet beyond the mean low water mark, which constitutes the boundary line between Delaware and New Jersey. It will consist of a single berth designed to accommodate LNG tankers ranging in size from 138,000 to 200,000 cubic meters in capacity. The berth will be oriented perpendicular to, but will not extend into, the shipping channel. Construction of the pier will require dredging of approximately 800,000 cubic yards of sediment to provide the berth with adequate water depths for vessels to reach the navigable channel of the Delaware River.

FEDERAL PERMITS

5. On February 18, 2005, FERC, as the lead federal agency, in cooperation and coordination with the U.S. Army Corps of Engineers, U.S. Coast Guard, U.S. Environmental Protection Agency, and the National Oceanic and Atmospheric Administration, issued a draft Environmental Impact Statement for the Project, pursuant to the National Environmental Policy Act (the "Draft EIS"). The Draft EIS spanned hundreds of pages and considered a multitude of factors. It proposed a number of measures to avoid, minimize or mitigate environmental impacts from the construction and operation of the Project. The Draft EIS concluded that, if constructed and operated in accordance with those proposed measures, the Project would have limited adverse

environmental impacts and "the risk to the public from accidental causes should be considered negligible."[1]

6. The Draft EIS stated that, because the pier will extend into the Delaware River across the boundary line into Delaware, Crown Landing will be required to obtain concurrence from the Delaware Department of Natural Resources and Environmental Control ("DNREC") that the Project is consistent with the Delaware Coastal Management Plan.[2] The Draft EIS also stated that, "[b]ecause the Crown Landing LNG Project would involve construction of a new pier and other facilities within Delaware's coastal zone to convey LNG from ships to the terminal, a determination on whether the facilities would be a permissible use under the DSCZA [Delaware State Coastal Zone Act] is required."[3]

7. In addition to approval from FERC under § 3 of the Natural Gas Act, Crown Landing requires federal permits issued by the U.S. Army Corps of Engineers pursuant to § 10 of the Rivers and Harbors Act, and § 404 of the Clean Water Act. Crown Landing submitted its application for those permits on January 31, 2005. On March 17, 2005, the U.S. Army Corps of Engineers, Philadelphia District ("COE") advised Crown Landing of its "responsibility to obtain State

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[1] Draft Environmental Impact Statement, Crown Landing LNG and Logan Lateral Projects at 5-1, Docket Nos. CP04-411-000 and CP04-416-000 (Feb. 18, 2005).

[2] *Id.* at 4-92.

[3] *Id.*

approval and water quality certification from the New Jersey Department of Environmental Protection, Land Use Regulation Program . . . and from Delaware Department of Natural Resources and Environmental Control." On March 18, 2005, the COE stated in its Public Notice that "Department of the Army permits will be granted unless the District Engineer determines that they would be contrary to the public interest."

8. On April 18, 2005, the New Jersey Board of Public Utilities advised FERC, in the letter attached as Exhibit 4, that it supported the Project. Provided all environmental and safety concerns were addressed, the Board said, the Project would "play an important part in ensuring a competitive and reliable supply of natural gas to New Jersey's and the region's energy customers." The Board noted that "this State has seen a steep increase in the price of natural gas, and it is our hope and expectation that this proposed LNG facility will help stabilize the cost of energy."

DELAWARE'S ACTIONS BLOCKING THE PROJECT

9. DNREC advised Crown Landing in 2004 that construction of the pier facilities appurtenant to the New Jersey shoreline would require permits from the State of Delaware pursuant to the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, § 7004 (2005), and the Delaware Subaqueous Lands Act, Del. Code Ann. tit. 7, § 7205 (2005).

Appendix 26

The Delaware Subaqueous Lands Permit

10. On September 27, 2004, Crown Landing submitted to DNREC an application for a Delaware Subaqueous Lands permit in order to gather samples from the riverbed at the site of the proposed pier. The sampling was needed to determine the characteristics of the sediment that would be dredged from the pier and berthing area as requested by New Jersey DEP and to facilitate the design of the pier and bulkhead.

11. On October 29, 2004, in the letter attached as Exhibit 1, DNREC formally requested Crown Landing to withdraw its application for the Subaqueous Lands permit. DNREC stated:

> [W]e cannot make a decision on your application until a determination has been made regarding whether construction of an LNG storage facility is an activity permissible in Delaware's coastal zone.
>
> Accordingly, we are requesting that you withdraw your subaqueous lands permit application ... until the conclusion of the coastal zone status decision process.

12. On November 4, 2004, Crown Landing acceded to DNREC's request and withdrew its Subaqueous Lands permit application.

Appendix 26

The Delaware Coastal Zone Act Permit

13. The Delaware Coastal Zone Act ("DCZA") states that certain uses are "absolutely prohibited" in the Delaware coastal zone. Del. Code Ann. tit. 7, § 7003 (2005). That prohibition apples to "[h]eavy industry uses of any kind" as well as any "offshore gas, liquid or solid bulk product transfer facilities" that were "not in operation on June 28, 1971." *Id.*

14. On December 7, 2004, Crown Landing submitted to John A. Hughes, the Secretary of the DNREC, a request for a status decision that the Crown Landing pier was permitted by the DCZA.

15. On February 3, 2005, Secretary Hughes advised Crown Landing, in the letter attached as Exhibit 2, that the Project represented an "offshore bulk transfer facility" as well as a "heavy industry use" that are both prohibited under the DCZA. He also concluded — with reference to structures to be located entirely within the State of New Jersey — that "the on-shore storage tanks essential to the operation of the facility are prohibited structures."

16. Secretary Hughes recognized the benefits of the Project but stated that his adverse determination did not go to the merits of the facility:

> This decision does not come without some appreciation of the need for additional natural gas supplies in this country nor the relative cleanliness of natural gas compared to other energy fuels. Despite the benefits that increased LNG imports

> might bring, placement of this facility within the boundary of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone. *Id.*

17. Crown Landing appealed Secretary Hughes' adverse determination to the State Coastal Zone Industrial Control Board ("Industrial Control Board"), pursuant to Del. Code Ann. tit. 7, § 7007 (2005). On March 30, 2005, the Industrial Control Board conducted a hearing on the appeal and voted unanimously to affirm the Secretary's decision.

18. On March 31, 2005, DNREC Secretary Hughes advised FERC, in the letter attached as Exhibit 3, as follows:

> We believe very strongly that our state Coastal Zone Act applies in this instance and that no mitigating measure or response actions exist that FERC or BP can take to reverse or alter our position with respect to the facility as planned on this site.
>
> This project is clearly a prohibited activity under Delaware law and we would request that FERC and BP act accordingly.

19. An appeal can be taken to the Superior Court for the State of Delaware from an adverse decision of the Industrial Control Board. Del. Code Ann. tit. 7, § 7008 (2005). However, any such appeal is statutorily limited, "the only issue being whether the Board abused its discretion in applying standards set forth by this chapter and regulations issued pursuant thereto to the facts of the particular case."

Id. Based on the advice of experienced Delaware counsel that an appeal of the Industrial Control Board's adverse determination would be futile under the standard set forth in § 7008, Crown Landing declined to pursue an appeal.

20. Officials of the State of New Jersey have recently informed Crown Landing that New Jersey objects to the efforts of the State of Delaware to apply its permitting requirements to this Project. On May 24, 2005, the New Jersey Department of Environmental Protection ("NJDEP") specifically notified Crown Landing in the letter attached as Exhibit 5 as follows:

> As State officials have made clear, . . . although a portion of the pier is proposed to be in Delaware, construction of the entire pier, and any associated dredging, is subject to New Jersey's exclusive review and permitting authority, and not that of Delaware. This is the case because the Compact of 1905 between New Jersey and Delaware, which was approved by the Legislatures of both States and by the United States Congress, gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River.

21. On May 26, 2005, Crown Landing advised FERC that, notwithstanding DNREC's decision withholding a DCZA permit, Crown Landing intended to pursue the Project as filed with FERC. Crown Landing further advised FERC that it was its understanding that New Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits

for the Project. Accordingly, Crown Landing requested FERC to approve the Project subject to the resolution of any outstanding controversy between New Jersey and Delaware concerning Delaware's claimed permitting authority.

SUMMARY

22. Because the Project received a favorable Draft EIS, and because Crown Landing has not been advised of any insurmountable impediment to the issuance of the necessary federal permits, Crown Landing fully anticipates receiving all federal permits required for the Project. However, some of those federal authorizations will be conditioned on obtaining all required State permits, and the State of Delaware has refused to issue Delaware state permits that Delaware insists are required for construction of the Project. Because Delaware imposes civil and criminal sanctions on anyone who conducts activities in Delaware waters without the required permits mentioned above, Crown Landing will be unable to undertake the necessary work unless New Jersey prevails in this litigation.

23. Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905. Given Delaware's determination that the Project is absolutely prohibited by the Delaware Coastal Zone Act, Crown Landing is awaiting the outcome of this case to resolve whether Delaware has any riparian jurisdiction over the Project.

I declare under penalty of perjury of the laws of the United States that the foregoing facts are true and correct.

Appendix 26

Executed on: June 27, 2005

_____/s/_____ _____
LAUREN B. SEGAL

EXHIBITS TO DECLARATION OF LAUREN B. SEGAL

1. Letter from Herr to Segal of 10/29/2004
2. Letter from Hughes to Segal of 2/3/2005
3. Letter from Hughes to Salas of 3/31/2005
4. Letter from Fox, et al., to Salas of 4/18/2005
5. Letter from Seebode to Blaha of 5/24/2005

APPENDIX 27 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 1, DATED OCTOBER 29, 2004

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Wetlands and Subaqueous Lands Section

Telephone 302/739-4691
Facsimile 302/739-6304

October 29, 2004

Lauren Segal
BP Crown Landing, LLC
501 West Lake Park Blvd
Houston, TX 77079

RE: Subaqueous Lands Permit Application No. SP-389/04 for BP Crown Landing, LLC

Dear Ms. Segal:

After reviewing the above-referenced permit application and considering public comments received during the public notice process, we have determined that we cannot make a decision on your application until a determination has been made regarding whether construction of an LNG storage facility is an activity permissible in Delaware's coastal zone.

Accordingly, we are requesting that you withdraw your subaqueous lands permit application to perform 19

geotechnical test borings until the conclusion of the coastal zone status decision process. If the proposed LNG storage and transfer activities are determined to be ones that are permissible in the coastal zone, the application for the test borings can be re-submitted at that time.

If you should have any questions regarding this matter, please feel free to contact me at 302/739-4691.

Sincerely,

/s/

Laura M. Herr
Program Manager
Wetlands and Subaqueous Lands Section

cc: Pete Swinick, Golder Associates, Inc.
John A. Hughes, Secretary, DNREC
Kevin C. Donnelly, Director,
Division of Water Resources

APPENDIX 28 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 2, DATED FEBRUARY 3, 2005

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 Kings Highway
Dover, Delaware 19901

OFFICE OF THE
SECRETARY

PHONE: (302) 739-4403
FAX: (302) 739-6242

February 3, 2005

Ms. Lauren Segal
Vice President
Crown Landing LLC
501 West Lake Park Blvd.
Houston, TX 77079

Re: Coastal Zone Act Status Decision

Dear Ms. Segal:

Based on the public comments, the assessment and recommendations of DNREC staff, and discussions with our legal representatives, I have reached a decision on your application for a coastal zone status request.

I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility,

as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore storage tanks essential to the operation of the facility are prohibited structures.

This decision does not come without some appreciation of the need for additional natural gas supplies in this country nor the relative cleanliness of natural gas compared to other energy fuels. Despite the benefits that increased LNG imports might bring, placement of this facility within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone.

There is a fourteen-day appeal period following the publication of the enclosed legal notice announcement of this decision. If you wish to appeal this decision to the State Coastal Zone Industrial Control Board, please call Dennis Brown at 302-739-3091 for an appeal form. There is a one-hundred dollar appeal fee. If no appeal is received within the appeal period, this decision becomes final.

Sincerely,

s/ John A. Hughes
John A. Hughes
Secretary

pc: Dennis Brown
David S. Swayze
Michael W. Teichman

Enclosure

APPENDIX 29 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 3, DATED MARCH 31, 2005

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE: (302) 739-4403
FAX: (302) 739-6242

March 31, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First St., N.E., Room 1A
Washington, DC 20426

RE: Docket Nos. CP04-411-000

Dear Ms. Salas:

This evening's meeting is expressly designed to gather public input on the draft EIS for the proposed Crown Landing LNG facility located in both Logan Township, New Jersey and the subaqueous lands within the State of Delaware. This letter and more detailed comments on the draft EIS will be submitted to FERC in advance of the April 18th submission deadline.

For this evening however, I want to emphasize a very important position on this project taken by the State of

Appendix 29

Delaware. The Commission is already aware that this project has sought, and failed to receive, a favorable status decision from the Department of Natural Resources and Environmental Control with regard to Delaware's Coastal Zone Act. On February 3, 2005, Delaware ruled that this proposed facility was indeed a prohibited bulk product transfer facility and is strictly prohibited within our Coastal Zone. Yesterday, Delaware's Coastal Zone Industrial Control Board in a lengthy and detailed hearing upheld that decision by unanimous vote.

The Draft EIS fails to adequately address the relevance of the Delaware Coastal Zone Act to continuation of the project. The Act was passed over 30 years ago to control the development of new heavy industries and bulk product transfer facilities within our coastal zone – a zone which extends to the mean low water line on the New Jersey side of the River in the vicinity of this project. We believe very strongly that our state Coastal Zone Act applies in this instance and that no mitigating measure or response actions exist that FERC or BP can take to reverse or alter our position with respect to the facility as planned on this site.

This project is clearly a prohibited activity under Delaware law and we would request that FERC and BP act accordingly. Thank you for you attention to this matter.

Sincerely,
/s/
John A. Hughes
Secretary

pc: Gas Branch 1, PJ-11.1

APPENDIX 30 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 4, DATED APRIL 18, 2005

State of New Jersey
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Jeanne M. Fox, Esq.
President

Kristi Izzo
Board Secretary
Tel: (973) 648-3426
Fax: (973) 648-2409

April 18, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Crown Landing LLC — Docket No. CP04-411-000

Texas Eastern Transmission, LP — Docket No. CP04-416-000

Dear Secretary Salas:

As the agency overseeing the State's energy policy, the New Jersey Board of Public Utilities wishes to express its support of the applications filed in the above-referenced matters. The proposed Liquefied Natural Gas ("LNG") storage facility should, if all safety and environmental concerns are adequately addressed, play an important part in ensuring a competitive and reliable supply of natural gas to

New Jersey's and the region's energy customers. It also should increase the diversity of supplies available to customers in this State and region.

The Board possesses general regulatory authority over the State's utilities. Its statutory charge includes ensuring the provision of safe, adequate and proper service at just and reasonable rates. The Board is responsible for protecting the public interest in a competitive and reliable supply of energy. As more residents have switched to natural gas for heating and more natural gas is used to produce electricity, New Jersey has experienced an increased demand for this resource. Southern New Jersey, where the proposed facility would be located, has had considerable population growth. Additionally, this State has seen a steep increase in the price of natural gas, and it is our hope and expectation that this proposed LNG facility will help stabilize the cost of energy.

From an energy supply perspective, the facility proposed for Logan Township, New Jersey should further the public interest and promote the policy goal of having reliable service for New Jersey's energy customers. The Board urges the Commission to approve this application, provided all environmental and safety concerns are adequately addressed.

BOARD OF PUBLIC UTILITIES
BY:

/s/ JEANNE M. FOX PRESIDENT

/s/ FREDERICK F. BUTLER COMMISSIONER

/s/ CONNIE O. HUGHES COMMISSIONER

/s/ JACK ALTER COMMISSIONER

KI/ac

APPENDIX 31 — DECLARATION OF LAUREN B. SEGAL, EXHIBIT 5, DATED MAY 24, 2005

State of New Jersey

Department of Environmental Protection

Richard J. Codey
Acting Governor

Bradley M. Campbell
Commissioner

May 24, 2005

Mr. David Blaha
Environmental Resources Management
200 Harry S. Truman Parkway
Suite 400
Annapolis, Maryland 21401

Re: Deficiency Letter for Waterfront Development Application
File No. 0809-02-011.1
Applicant: Crown Landing LLC
Project: Crown Landing LNG Import Terminal
Block 101, Lot 2
Location: Logan Township, Gloucester County

Dear Mr. Blaha:

On February 4, 2005, the Office of Dredging and Sediment Technology ("ODST") sent you a deficiency letter regarding this project. This letter will correct an observation made in that letter regarding the project site and New Jersey's jurisdiction, review, and regulatory authority over the project, specifically the observation that activities taking place below

the mean low water line are subject to Delaware coastal zone regulations rather than to New Jersey's regulatory authority.

As stated in the ODST letter of February 4, 2005, the project consists of construction and operation of a liquefied natural gas terminal in Logan Township, Goucester County, New Jersey. The project is proposed to include construction of a berthing pier in the Delaware River and associated dredging.

The proposed liquefied natural gas plant would be located entirely within the State of New Jersey, while the proposed pier needed to service the plant would be attached to the New Jersey shoreline and extend into the Delaware River within the 12 Mile Circle. Thus, the pier would originate in New Jersey and extend into Delaware.

As State officials have made clear, and as recognized in a May 13, 2005 letter from Gregory S. Roden, Esq., Senior Attorney for BP America, Inc. to David Risilia of ODST, although a portion of the pier is proposed to be in Delaware, construction of the entire pier, and any associated dredging, is subject to New Jersey's exclusive review and permitting authority, and not that of Delaware. This is the case because the Compact of 1905 between New Jersey and Delaware, which was approved by the Legislatures of both States and by the United States Congress, gives New Jersey exclusive riparian jurisdiction of every kind and nature on its side of the Delaware River. Thus, you should disregard any indication in the February 4, 2005 letter that may suggest anything to the contrary.

Very truly yours,
/s/
Joseph J. Seebode
Assistant Commissioner

Appendix 31

c: Laurie Beppler, BP Crown Landing
William Jenkins, ACOE Philadelphia
District Regulatory Branch
Anita Ripotella, National Marine Fisheries Service
Steve Mars, US Fish and Wildlife
Robert Kopka, FERC
Lingard Knutson, USEPA Region II
Daniel Ryan, Special Assistant to the Commissioner
Don Wilkenson, NJDEP Fish and Wildlife
Dave Risilia, NJDEP ODST

APPENDIX 32 — STATE OF NEW JERSEY ASSEMBLY RESOLUTION NO. 260, ADOPTED MAY 2, 2005

ASSEMBLY COMMITTEE SUBSTITUTE FOR

ASSEMBLY RESOLUTION No. 260

STATE OF NEW JERSEY

211th LEGISLATURE

ADOPTED MAY 2, 2005

Sponsored by:
Assemblyman JOHN J. BURZICHELLI
District 3 (Salem, Cumberland and Gloucester)
Assemblyman DOUGLAS H. FISHER
District 3 (Salem, Cumberland and Gloucester)
Assemblyman JEFF VAN DREW
District 1 (Cape May, Atlantic and Cumberland)

Co-Sponsored by:
Assemblyman Mayer, Assemblywoman Quigley, Assemblymen Stack, Prieto, Hackett, Payne, Johnson, McKeon and Scalera

SYNOPSIS

Urges State of Delaware to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905.

CURRENT VERSION OF TEXT

Substitute as adopted by the Assembly Commerce and Economic Development Committee.

Appendix 32

AN ASSEMBLY RESOLUTION requesting the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, approved by Congress, 34 Stat. 858 (1907), to make clear that the Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

WHEREAS, Along the section of the Delaware River that falls within a 12 mile radius of New Castle, Delaware, the eastern boundary of the State of Delaware is the mean low-tide line on the New Jersey side of the Delaware River, a boundary originating in the original royal grants to William Penn of land which would later become the States of Delaware and Pennsylvania; and

WHEREAS, The State of Delaware exercises its authority over its land bordering and extending into the Delaware River pursuant to the Delaware Coastal Zone Act, 7 Del.C. s.7001 et seq., which subjects to state regulation industrial facilities and bulk product transfer facilities proposed for construction in the Delaware coastal zone; and

WHEREAS, New Jersey and Delaware entered into the Compact of 1905 to determine the jurisdiction of each State over the Twelve Mile Circle portion of the Delaware River, codified at R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; and approved by Congress on January 24, 1907, 34 Stat. 858

(1907), and this Compact was interpreted by the United States Supreme Court in New Jersey v. Delaware, 291 U.S. 361 (1935); and

WHEREAS, Under the Compact of 1905 each State retained its riparian rights; Article VII provides in full: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." R.S.52:28-41; and

WHEREAS, On February 5, 2005, the Delaware Department of Natural Resources and Environmental Control declared that the siting of a liquefied natural gas import facility and regasification plant in Logan Township, Gloucester County, New Jersey was prohibited under the Delaware Coastal Zone Act; and

WHEREAS, Each State's rights under the Compact of 1905 are a matter of settled law; the State of Delaware's implementation of its Coastal Zone Act in its present form infringes on the State of New Jersey's regulation of facilities within its jurisdiction under the Compact and serves only to undermine the amicable relations that usually prevail between the two States; and

WHEREAS, Because of the long standing regional cooperation shared by New Jersey and its bordering states, it is in the best interests of the State of Delaware, the State of New Jersey, and all states in the region, for the State of Delaware to amend its Coastal Zone Act to conform it

to the Compact of 1905 between New Jersey and Delaware, to make clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41; now, therefore,

BE IT RESOLVED *by the General Assembly of the State of New Jersey:*

1. This House urges the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; approved by Congress, 34 Stat. 858 (1907), to make clear that the Delaware Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

2. Duly authenticated copies of this resolution, signed by the Speaker of the General Assembly and attested by the Clerk of the General Assembly, shall be transmitted to the Governor of the State of Delaware, the Lieutenant Governor of the State of Delaware, the Speaker of the Delaware House of Representatives, the President ProTempore of the Delaware State Senate, and the Secretary of the Delaware Department of Natural Resources and Environment Control.

APPENDIX 33 — STATE OF NEW JERSEY SENATE RESOLUTION NO. 100, INTRODUCED MAY 19, 2005

SENATE RESOLUTION No. 100

STATE OF NEW JERSEY

211th LEGISLATURE

INTRODUCED MAY 19, 2005

Sponsored by:
Senator STEPHEN M. SWEENEY
District 3 (Salem, Cumberland and Gloucester)

SYNOPSIS

Urges State of Delaware to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905.

CURRENT VERSION OF TEXT

As introduced.

A SENATE RESOLUTION requesting the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, approved by Congress, 34 Stat. 858 (1907), to make clear that the Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

Appendix 33

WHEREAS, Along the section of the Delaware River that falls within a 12 mile radius of New Castle, Delaware, the eastern boundary of the State of Delaware is the mean low-tide line on the New Jersey side of the Delaware River, a boundary originating in the original royal grants to William Penn of land which would later become the States of Delaware and Pennsylvania; and

WHEREAS, The State of Delaware exercises its authority over its land bordering and extending into the Delaware River pursuant to the Delaware Coastal Zone Act, 7 Del.C. s.7001 et seq., which subjects to state regulation industrial facilities and bulk product transfer facilities proposed for construction in the Delaware coastal zone; and

WHEREAS, New Jersey and Delaware entered into the Compact of 1905 to determine the jurisdiction of each State over the Twelve Mile Circle portion of the Delaware River, codified at R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; and approved by Congress on January 24, 1907, 34 Stat. 858 (1907), and this Compact was interpreted by the United States Supreme Court in New Jersey v. Delaware, 291 U.S. 361 (1935); and

WHEREAS, Under the Compact of 1905 each State retained its riparian rights; Article VII provides in full: "Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." R.S.52:28-41; and

Appendix 33

WHEREAS, On February 5, 2005, the Delaware Department of Natural Resources and Environmental Control declared that the siting of a liquefied natural gas import facility and regasification plant in Logan Township, Gloucester County, New Jersey was prohibited under the Delaware Coastal Zone Act; and

WHEREAS, Each State's rights under the Compact of 1905 are a matter of settled law; the State of Delaware's implementation of its Coastal Zone Act in its present form infringes on the State of New Jersey's regulation of facilities within its jurisdiction under the Compact and serves only to undermine the amicable relations that usually prevail between the two States; and

WHEREAS, Because of the long standing regional cooperation shared by New Jersey and its bordering states, it is in the best interests of the State of Delaware, the State of New Jersey, and all states in the region, for the State of Delaware to amend its Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, to make clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41; now, therefore,

BE IT RESOLVED *by the Senate of the State of New Jersey:*

1. This House urges the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, R.S.52:28-34

through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; approved by Congress, 34 Stat. 858 (1907), to make clear that the Delaware Coastal Zone Act does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

2. Duly authenticated copies of this resolution, signed by the President of the Senate and attested by the Secretary thereof, shall be transmitted to the Governor of the State of Delaware, the Lieutenant Governor of the State of Delaware, the Speaker of the Delaware House of Representatives, the President Pro-Tempore of the Delaware State Senate, and the Secretary of the Delaware Department of Natural Resources and Environment Control.

STATEMENT

This Senate Resolution urges the Governor of the State of Delaware and the Delaware General Assembly to amend the Delaware Coastal Zone Act to conform it to the Compact of 1905 between New Jersey and Delaware, R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; approved by Congress, 34 Stat. 858 (1907), to make clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact, R.S.52:28-41.

Along the section of the Delaware River that falls within a 12 mile radius of New Castle, Delaware, the eastern boundary of the State of Delaware is the mean low-tide line on the New Jersey side of the Delaware River, a boundary originating in the original royal grants to William Penn of

land which would later become the States of Delaware and Pennsylvania. The State of Delaware exercises its authority over its land bordering and extending into the Delaware River pursuant to the Delaware Coastal Zone Act, 7 Del.C. s.7001 et seq., which subjects to state regulation industrial facilities and bulk product transfer facilities proposed for construction in the Delaware coastal zone.

New Jersey and Delaware entered into the Compact of 1905 to determine the jurisdiction of each State over the Twelve Mile Circle portion of the Delaware River, codified at R.S.52:28-34 through R.S.52:28-46; ratified by the Laws of Delaware 1905, p.121; and approved by Congress on January 24, 1907, 34 Stat. 858 (1907). This Compact was interpreted by the United States Supreme Court in New Jersey v. Delaware, 291 U.S. 361 (1935). Under Article VII of the Compact of 1905 each State retained its riparian rights. Article VII provides in full: "Each state may, on its own side of the River, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." R.S.52:28-41.

On February 5, 2005, the Delaware Department of Natural Resources and Environmental Control declared that the siting of a liquefied natural gas import facility and regasification plant in Logan Township, Gloucester County, New Jersey was prohibited under the Delaware Coastal Zone Act.

Appendix 33

This resolution urges the State of Delaware to amend its Coastal Zone Act to conform it to the Compact of 1905 to make it clear that it does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to the Compact.

APPENDIX 34 — BRIEF FOR PLAINTIFF ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, DATED DECEMBER 18, 1933 (EXCERPT, COMPACT OF 1905)

NEW JERSEY-DELAWARE BOUNDARY CASE.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933.
No. 13, Original.

STATE OF NEW JERSEY,

Plaintiff.

vs.

STATE OF DELAWARE,

Defendant.

On Exceptions to the Report of the Special Master.

BRIEF FOR PLAINTIFF.

WILLIAM A. STEVENS
Attorney General,
Solicitor for Plaintiff.

GEORGE S. HOBART,
DUANE E. MINARD,
Counsel.

December 18, 1933.

Appendix 34

[table of contents intentionally omitted]

* * *

II. (7) Compact of 1905.

(7) Compact of 1905.

(Exceptions 91-3.)

In the months of April and May, 1872, officers of defendant arrested 20 or more citizens of plaintiff while fishing in Delaware river, east of the middle of the river, within a radius of 12 miles of New Castle, on the claim that that part of the river belonged to defendant and that the fishermen were violating a law of defendant, passed the previous year *(Ex. 693, p. 22)*. That was the first, and only, time that defendant has ever attempted to enforce its laws, or assert any authority or jurisdiction, therein. A controversy arose between the two states, described in the proclamations and correspondence of their respective governors recited in Exhibit 693, pp. 23-38. Plaintiff's legislature authorized the appointment of a commission to settle the dispute, but defendant declined to join in that project *(ibid)*. Plaintiff, by leave of the court, filed its bill of complaint March 13, 1877, praying for the ascertainment of the true boundary between the two states and of the rights and estate of petitioner in the bed of the river in that area, and of the rights of its citizens and inhabitants to fish therein, and that defendant be enjoined from interference therewith *(Ex. 693, pp. 40-41)*.

Appendix 34

A motion for preliminary injunction, argued March 18, 1877, resulted in an order of March 26, 1877 (*State of New Jersey v. State of Delaware, No. 17, Original, October Term, 1876*), reading as follows:

> "This cause coming on to be heard on a motion for a preliminary injunction made on behalf of the complainant, and being argued by Mr. Frelinghuysen and Mr. Vanatta for the complainant, and by Mr. Bayard for the defendant, and it appearing by the allegations of the bill, duly verified by affidavits and other evidence of public character, that for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same, where the said river runs between the said State and the State of Delaware, and that (except as hereinafter stated) the citizens and inhabitants of New Jersey have, during said period, exercised the right of freely fishing in said river, in common with the citizens and inhabitants of said State of Delaware, but that recently, to wit, from and since the year 1872, the State of Delaware has claimed exclusive jurisdiction of the whole of said river from the southerly line of Pennsylvania southwardly to the distance of twelve miles below the town of New Castle, and has interfered with and claimed to control the right of fishing thereon, and has exacted fines and other impositions from the said citizens and inhabitants of New Jersey for fishing as aforesaid, unless they

would take out licenses for that purpose from the authorities of the State of Delaware, and pay certain fees and exactions for said licenses, and has caused to be arrested certain of said citizens and inhabitants for refusing to comply with such requirements; and that the State of Delaware still threatens and intends to enforce its said claims, which are resisted by the State of New Jersey; and that the public peace between the citizens and inhabitants of said States is liable to be endangered and interrupted by reason of the premises; and this suit being brought for the purpose of determining the true boundary line between the said States, and settling the controversies between them in reference to the matters aforesaid; therefore—

It is ordered by the court that an injunction do issue to enjoin and restrain the said State of Delaware, its officers, agents and servants, that they and each and every of them do henceforth desist and refrain from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do, before the said interference; and from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in

said river as aforesaid, until this court shall make other order to the contrary" (*Ex. 237, pp. 13-15*).

Defendant filed its answer, claiming title and jurisdiction in the bed of the river to low water mark on the east side within a radius of 12 miles of New Castle. A compact having been agreed upon between the parties (*Ex. 237, pp. 18-26*), the case was, on April 15, 1907, discontinued without prejudice (*205 U.S. 550*).

That case involved only the right of common fishery by citizens of plaintiff in Delaware river within a radius of 12 miles of New Castle. The pleadings did not include any question of territorial jurisdiction or boundary outside that area (*Ex. 693*). No question was raised in that case by defendant respecting grants theretofore made by plaintiff of lands under water below low water line in the area in dispute, or respecting the right, title and interest of the grantees, or respecting appropriations to their exclusive use, by citizens of New Jersey of lands below low water line in that area. Such titles and interests have never been questioned by defendant, and have been enjoyed and exercised, continuously, by plaintiff from the first legislative grant of such lands in 1854 down to the present time, and such appropriations have been made and enjoyed since before 1801, according to the present record.

The Compact was ratified by plaintiff's legislature March 21, 1905 (*Ex. 161, pp. 35-6*); by defendant's legislators on March 20, 1905 (*Ex. 161, pp. 14-15*) and approved by Congress January 24, 1905 (*Ex. 53; 34 St. L. Pt. I, Ch. 394, p. 858*).

Appendix 34

The Compact recites the controversy between the parties:

> "relative to jurisdiction of such portion of the Delaware river as is included within the circle of 12 miles radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom."

It recites the pendency of the suit in this court and the injunction granted therein in 1877 (*Ex. 53, p. 1*).

Articles I and II provide for concurrent jurisdiction in civil and criminal processes on the entire river.

Article III provides for concurrent rights of common fishery by the inhabitants of both states on any part of the river between low water marks, "except so far as either state may have heretofore granted valid and subsisting private rights of fishery." The Compact further provides as follows:

> "Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective States.
>
> Article VIII. Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in or over the Delaware river,

> or the ownership of the subaqueous soil thereof, except as herein expressly set forth" (*Ex. 53, p. 5*).

The Master, after quoting said sections, said

> "Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide" (Rep. p. 54).

He found that this Compact recognized a right of riparian owners to wharf out on the easterly side of the Delaware river within the 12 mile circle but that it did not convey to plaintiff title to any part of the river or to any part of the subaqueous soil thereof, and did not in anywise alter or affect the boundaries of the respective states *(Rep. p. 77, Finding No. 23)*. He recommended a decree as follows: "That within the 12 mile circle the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware; subject to the Compact of 1905" *(Rep. p. 80, Recommendation No. 1)*. That finding and that recommendation appear to be inconsistent and indefinite.

At the time the Compact was made owners of the shore front, referred to by the Master as "riparian owners" had no right to wharf out, and had no rights below high water mark. Under the heading "*Riparian Rights and Grants*" of this brief, it appears that such rights were recognized prior to an Act of 1851 *(N. J. P. L. 1851, p.* 335). From that time until the enactment of Chapter 383, in 1869, *(N. J. P. L. 1869,*

p. 1007) they still had the right to wharf out to low water line without public permission, but the Act of 1851 was then repealed and thereafter private use of the land below high water mark could not be acquired except by a grant from plaintiff, at other places in New Jersey, and that law was applied to the Delaware river and bay in 1871 (*N. J. P. L. 1871, p. 44*).

Numerous grants were made by plaintiff in the bed of the river below low water mark, between 1854 and the date of the Compact (*Exs. 3, 41, 42, 43, 44, 48, 70, 92; R. 125; 280, 282, 291; 382-4, 522-40*).

After the Compact was made, plaintiff, without objection by defendant, continued to make grants of the bed of the Delaware river below low water mark in that area; 25 of these are shown in this record (Exs. 58-69; 73-91; 93-7; 2; 3; 57; 127; R. 120; 291; 84-90; 117-123; 130-155; 265-292).

Most of these grants extend to the bulkhead lines established by plaintiff in 1877 (*Ex. 144*) or to a later one in 1916, both of which were *below* low water mark at distances varying from 378 to 3,550 feet (*Ex. 144, R. 339; Ex. 145; R. 275, 290-1, 340-1*).

The Compact constituted the settlement of a litigation in which the boundary, including territory and jurisdiction within a radius of 12 miles of New Castle, was directly in controversy. Defendant claimed to low water mark on the east side. Plaintiff claimed to the middle of the ship channel, and it had granted lands, and citizens of both states had purchased such titles from plaintiff and possessed and

improved them at great expense, in the bed of the river below low water mark. This, although not involved in the lawsuit any more than the oysters and clams mentioned in Article VI of the Compact, was considered by the commissioners, and they agreed that plaintiff " on its own side of the river," should "*continue* to exercise riparian jurisdiction of *every kind and nature*, and to *make grants, leases and conveyances* of riparian lands and rights" under its own laws. If that language referred to lands between high and low water mark, *only*, it was meaningless, since defendant never claimed such lands. Plaintiff had, for 60 years, prior to the date of the Compact, made a practice of conveying the bed of the river to navigable water at low tide (*Exs. 41, 42, 43, 44, 48*). Docks and other permanent fixed improvements, accessible to vessels at low tide, were built on these tracts, and are still in use.

On that state of facts, the above quoted language of the Compact was adopted. It meant lands *below* low water mark, or it meant nothing, since there were no grants by plaintiff of land *between* high and low water marks.

When the Master says that Compact conveyed no title to any part of the subaqueous soil of the river or in anywise altered or affected the boundary (assuming, as he does, that the boundary is at low water mark) *(Rep. p. 77, Finding No. 23)*, he overlooks the very important exception in Article VIII of the Compact, reading:

> "Nothing herein contained shall affect the *territorial limits*, rights or jurisdiction of either State of, *in* or over *the Delaware river, or the ownership of the subaqueous soil thereof*, **except**

as herein expressly set forth" (*Ex. 53, p. 5*). (Italics ours.)

That exception, taken with Article VII, can have but one meaning respecting "territorial limits" "*in*" "the Delaware river, or the *ownership of the subaqueous soil* thereof," namely, to concede to plaintiff its claim of title and jurisdiction, and the right to convey that title and exercise that jurisdiction, in the subaqueous soil in the river *below* low water mark east of the main ship channel.

It has been so interpreted by both parties ever since, and that interpretation has not been questioned in this suit.

Not only has plaintiff continued to grant this land (to the extent of above 10,000 lineal feet) ever since that Compact was made, but such grants have been accepted during that time by citizens of defendant to the extent of more than 5,000 lineal feet, for considerations aggregating more than $87,000.

Plaintiff has acted upon that interpretation, without a single objection from defendant, for the past 28 years. It established its new pierhead line in that area in 1916 (*Ex. 145*), and all the grants made since that time by plaintiff have extended to that line, including those made to and accepted by citizens of defendant; in several instances to a Delaware corporation, in which the Attorney General of defendant was one of the incorporators at the time the grant was obtained, and these grants have been improved by the purchasers to the extent of several millions of dollars.

Defendant has never yet objected to, or raised any question about, these grants.

Plaintiff submits that these facts show a practical construction by both parties of this Compact which has been acted upon by plaintiff, and acquiesced in by defendant, during the past 28 years, and that the Master is in error if the language he uses (*Finding No.* 23, *Rep. p.* 77) means that defendant did not concede to plaintiff by that Compact any title to any part of the subaqueous soil of the river below low water line on the east side thereof, and did not in anywise alter or affect the boundary, as then claimed by defendant on that low water line. Plaintiff contends that that Compact did concede to plaintiff title to the subaqueous soil of the river, within a radius of 12 miles of New Castle, to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used, or may develop and use, the subaqueous soil on that side.

The Master therefore errs in finding and concluding that defendant has title to low water mark on the east side of the river, within a radius of 12 miles about New Castle, and that this Compact did not in anywise alter or affect that boundary.

* * * *

APPENDIX 35 — REPLY BRIEF OF DEFENDANT BEFORE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1929 (EXCERPT, POINT I)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 19 Original. **October Term, 1929.**

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

REPLY BRIEF OF DEFENDANT BEFORE SPECIAL MASTER.

REUBEN SATTERTHWAITE, JR.
Attorney General of the State of Delaware
CLARENCE A. SOUTHERLAND,
Special Counsel.

WARD & GRAY,
Of Counsel.

Appendix 35

[table of contents intentionally omitted]

This reply brief will be devoted to answering certain of the arguments advanced in Plaintiff's first brief, and will follow the subject headings in Plaintiff's brief.

I. Points 4 to 21, Inclusive. Brief, pp. 20-146.

Under the heading of points four to twenty-one of the first division of the argument, Plaintiff's brief discusses common law rights in tidal waters and certain modifications of the common law that arose in the American colonies. It is urged that these changes in the common law were binding upon William Penn and operated to defeat his title to the bed of the Delaware River east of the main ship channel within the twelve-mile circle.

To the statement of the common law of England respecting tidal waters we take no exception. In answer to the statement that the common law prevails in Delaware (Brief, p. 25), we would point out that the common law of the State of Delaware differs from the common law of England with regard to the foreshore in that in Delaware the owner of lands fronting on navigable rivers holds to low-water mark instead of to high-water mark.

Harlan & Hollingsworth v. *Paschal*, 5 Del. Ch. 435;

State v. *Reybold*, 5 Harr. 484, 486.

This modification of the English law is undoubtedly due to custom and usage.

Appendix 35

On pages 36 to 72 of the brief, the argument is developed that from earliest colonial times the inhabitants of New Jersey were accustomed to exercise certain riparian privileges not recognized by the strict doctrine of the common law, including particularly the right to wharf out to at least low-water mark.

Plaintiff also refers to the rights of navigation and of fishery which existed in the inhabitants of the province of New Jersey, but these rights, as we shall hereafter show, were common to all British subjects and are in no wise based upon colonial custom. The right of *several* fishery that exists in New Jersey is undoubtedly the growth of a colonial custom.

Plaintiff argues that the right of the citizens of New Jersey to wharf out is in some way inconsistent with or adverse to the ownership of the subaqueous soil of the Delaware River by William Penn. This contention is without merit. In the first place the New Jersey cases relied on by Plaintiff seem to limit this right to low-water mark.

See *Bell* v. *Gough*, 23 N. J. Law 624, 668, where the Court of Errors and Appeals said:

> "The facts and considerations above stated, it seems to me, establish not only a usage originating with the first settlement of this state, coextensive with its limits, and until recently unquestioned, for the owners of land adjoining to its navigable waters to appropriate to their exclusive use the shores of such waters to the low water line, but that this usage has been sanctioned

> by the courts and by repeated legislative enactments too unequivocal to admit of dispute and too plain to be disregarded."

Whether or not the grant to the Duke of York and the grant of the Duke of York to Berkeley and Carteret carried title to the foreshore of the Delaware River and Bay, it is a fact that the State of Delaware has never claimed any title above low water mark on the New Jersey shore, so that the existence of an ancient right to wharf out to low water mark in the inhabitants of the Province of New Jersey is in no way inconsistent with the Penn title.

In the second place, however, viewing the matter in a much broader light, the law in most of the States of the Union recognizes the right of a riparian owner, in the absence of legislative restriction, to wharf out for the purpose of obtaining access to the navigable portion of the river. See the discussion in Volume 1, Farnham on "Waters and Water Rights," sections 62-66; and the review of the State decisions by Mr. Justice Gray in *Shively* v. *Bowlby*, 152 U.S. 1.

The courts of the State of New Jersey, however, not recognizing the *title* of the riparian proprietor below high water mark, have of necessity somewhat limited these rights. In the State of New Jersey the riparian owner has no title below high water mark. This was the common law of England. The right of the riparian owner in New Jersey to wharf out is not based on any theory of title to the foreshore or to the subaqueous soil of the river. It is a right which is in the nature of a burden upon the ownership of the foreshore

and subaqueous soil. It is a right which is recognized at least as fully, if not more fully, by the laws of the State of Delaware. The holder of such a right does not hold it adversely to the State as the owner of the subaqueous soil but in effect derives it from the State.

It follows, therefore, that the existence of this right and its use by the erection of a wharf is not an act which is hostile to the State as owner and can not be made the foundation for a claim of adverse possession.

The New Jersey doctrine of riparian rights is stated by Justice Potts in *Bell* v. *Gough, supra,* as follows (p. 681):

> "The result is, that though the legal title of the Messrs. Coles, under whom the defendant in error holds, extends only to the line of ordinary high water mark, yet they possess rights, as riparian owners in the adjacent shore and waters, of which they cannot be divested without their consent, or compensation; that the land between high and low water mark belongs to the state for the use and benefit of the public, but that this title cannot be granted to a private person for a private use; that the act of 1836 is inoperative and void, and that, consequently, as no title passed from the state to those under whom the plaintiff in error claims, she has failed to maintain her plea, and the judgment below must be affirmed."

Appendix 35

In *State* v. *Jersey City*, 25 N. J. Law 525, Judge Elmer of the New Jersey Supreme Court said:

> "It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under the water. It may be granted by the state to a stranger, at any time before it is actually reclaimed and annexed to the upland. Such is unquestionably the common law, and I am aware of no alteration of it in this respect in New Jersey. Some of the judges seem to have expressed a different opinion in the case of *Bell* v. *Gough*, before the Court of Errors, but no case has been decided which establishes a different doctrine. In that matter, I concur myself with the opinion expressed by Judge Randolph. 2 *Zab.* 491. If the blocks and lots covered with water had been in this case valued and assessed entirely distinct from the upland, I should have felt constrained to hold that the assessment could not be supported."

The result of these decisions in New Jersey would seem to make it clear that before the New Jersey legislature undertook by various riparian acts to protect the riparian

rights of the owners of the upland the common law doctrine prevailed and was modified only in so far as the riparian owner actually reclaimed the shore or exercised his riparian right by the actual erection of a wharf.

It follows from the foregoing decisions of the New Jersey courts, as well as from the general law on the subject, that the recognition of such riparian rights in colonial times never had the effect of passing *title to the soil* to the riparian owner. Much less did it have the effect of vesting title in the province of New Jersey to the bed of the river east of the main ship channel. Plaintiff does not expressly claim that the recognition of these riparian rights vested such title in the Province of New Jersey. Yet that must be the contention of Plaintiff, because otherwise the argument is beside the point.

Plaintiff's brief says (p. 70):

> "The foregoing authorities show that, independent of the common law of England respecting public rights in tidal waters, a modification of the strict common law rule came into practice and common usage among the settlements on Delaware river and bay at the beginning of colonial history, as a matter of necessity arising from their situation and conditions, which had the implied, if not the actual, approval of the Crown and its successors in sovereignty. Under such modifications of the common law rights have sprung up, in favor of plaintiff and its inhabitants in the bed of tidal waters of Delaware river and bay, east of the ship

> channel, which are binding upon defendant, whether it derives its title from Penn (who was one of the West Jersey Proprietors at the times mentioned) or from the Crown."

We agree that under colonial usage and custom in both the Province of New Jersey and the Colony of Delaware riparian rights sprang up, unknown to the English common law. What of it? Such rights are in no wise inconsistent with the fact that the ownership of the subaqueous soil was vested in William Penn, and the recognition of such rights could not avail to change the boundaries of the colonies.

We are here concerned with a question of title and boundaries. If the riparian owner's right to wharf out vested in him no title to the foreshore or the subaqueous soil of the river then the title thereto remained unaffected by the existence of the right. Moreover, that right flowed from custom and usage sanctioned by the proprietaries of both colonies. It is elementary that one who claims a right derived as grantee of another does not hold adversely to the other and can not by the exercise of that right acquire title by adverse possession.

The conclusion, therefore, is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn. It was a right which he and all other proprietaries of American colonies accorded to the inhabitants of those colonies.

Appendix 35

Plaintiff is here seeking to establish *title* to the subaqueous soil of the Delaware River east of the main ship channel. Such title can not be established by pointing to the exercise of riparian rights by the inhabitants of the Province of New Jersey. Even if it could be argued that the riparian owner acquired title by adverse possession to the subaqueous soil underneath the wharf erected by him, such adverse possession would not inure to the benefit of New Jersey and would not shift the boundary line between the States.

It is to be noted that Plaintiff does not expressly claim that the exercise of riparian rights by the inhabitants of the Province of New Jersey had the effect of establishing title in the proprietors of New Jersey to the middle of the main ship channel. We do not see how such a proposition could be argued. Yet unless Plaintiff is prepared to make such an argument it is not seen how the existence of wharf rights has any bearing on the case. If the Province of New Jersey at the time of the Revolution did not hold title to the eastern half of the Delaware River and if the riparian owners on the western shore of New Jersey did not hold such title—and both these propositions seem to be admitted by Plaintiff—then the title was of necessity in William Penn by virtue of the deeds of feoffment and the letters patent of March 22, 1682/3, from the Crown.

To put the matter in another way, the right of the riparian owner to wharf out does not rest upon title to the subaqueous soil, and a claim to ownership of the subaqueous soil by the State of Delaware is not inconsistent with the use of such subaqueous soil by the riparian proprietor for the purpose of wharfing out.

Appendix 35

Let us suppose that after a lapse of time a riparian owner who has erected a wharf upon subaqueous soil in front of his property tears down that wharf and does not rebuild it. Surely it can not be said that he holds title to the subaqueous soil which is no longer covered by a wharf. He still has the right to build another wharf, but the ownership of the soil is not thereby changed.

Let us suppose again that a valuable mineral deposit is found in the subaqueous soil of the river within the area circumscribed by the piling of the wharf erected by the owner of the upland. Could it be contended for a moment that the owner of the upland, by virtue of his having erected a wharf, would have any title to such deposit? Clearly not. Nor could the riparian owner contend that by virtue of his long possession of the wharf he had acquired a title by prescription to the subaqueous soil.

As pointed out in our original brief, nearly all the New Jersey grants of riparian rights within the twelve-mile circle, and practically all the improvements on the New Jersey shore within the twelve-mile circle, were made or built after the institution of the prior suit in 1877. The failure of the State of Delaware to attempt to tax these improvements during the pendency of this suit can not be ascribed to laches nor can any acquiescence be imputed to the State during that time.

Riparian rights of the New Jersey side of the river were recognized by the Compact of 1905, quoted on page 126 of Plaintiff's brief. Article VII of this Compact recognizes, by implication, the rights of riparian owners on the New Jersey shore. It is to be noted that Article VII refers to "riparian

lands and rights". Subaqueous soil is not comprehended with the term "riparian lands".

Hart v. *Board of Levee Commissioners*, 54 Fed. 559;

Bathgate v. *Irvine*, 58 Pac. 442, 126 Cal. 135;

Rome Railway & Light Co. v. *Loeb*, 141 Ga. 202, 80 S. E. 785, Ann. Cas. 1915 C. 1023.

Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights. That the Compact of 1905 left the title to the subaqueous soil unaffected is clear from the express language of Article VIII.

Plaintiff's brief says (p. 126)

> "That compact, alone, is sufficient to sustain the title of plaintiff and its grantees in the bed of the river east of the ship channel, independent of all other considerations."

It may be safely said that this contention is one that did not occur to Plaintiff's counsel until after the suit was field. The Bill of Complaint in this case (Rec., pp. 4-18) sets forth with great particularity the source of Plaintiff's claim of title to the eastern half of the Delaware River and nowhere mentions the Compact of 1905 as the source of that claim. Moreover, the construction placed upon the Compact at all times since its execution and approval by Congress has been

the reverse to that now contended for by Plaintiff. Since 1907 the United States has accepted several cessions of subaqueous soil from the State of Delaware east of the ship channel within the circle. It is safe to say that the contention made in Plaintiff's brief in this case is the first time that the idea has ever been advanced that the Compact of 1905 settled the boundary dispute within the twelve-mile circle. Certainly if it had settled the dispute by ceding to New Jersey the eastern half of the river there would have been no occasion whatever for the language of Article VIII of the Covenant which expressly reserves the boundary question from the settlement.

On pages 132-146 of the brief Plaintiff discusses the exercise of admiralty jurisdiction and rights of navigation upon the assumption that these were acts of dominion by the province of New Jersey over the Delaware River. This assumption is wholly unfounded. By the English common law the right of navigation of a navigable river was a right in the subject, protected by the Crown, and every grant of the subaqueous soil of a navigable river was subject to this right. The exercise of admiralty jurisdiction was the exercise of the Royal prerogative applicable alike to colonial and proprietary colonies, and in no wise inconsistent with the ownership of the subaqueous soil by William Penn.

It is stated (Plaintiff's brief, p. 132) that defendant has produced no record of any judicial or other proceeding which shows the exercise of jurisdiction by the State of Delaware within the twelve-mile circle. This statement ignores the evidence that was presented to the arbitrator in the *Case of Pea Patch Island*, a summary of which is found in the opinion, and ignores numerous instances of the exercise of

jurisdiction testified to by the witnesses in the former suit. (Exhibits 691, 692, 694, 719.)

Plaintiff's brief (p. 140) refers to Defendant's Exhibit 569 as an exhibit introduced "to show exercise of admiralty jurisdiction in New Castle." The exhibit was introduced for the purpose of showing that the Admiralty Court which, as Plaintiff rightly says, was a Royal Court and not a Colonial Court, *judicially construed the phrase:* "territories thereof and thereon depending" as meaning the Delaware counties. Many of the acts of the Pennsylvania Colonial Assembly contained this phrase and its meaning is thus judicially determined in the case summarized in Exhibit 569.

* * * *

APPENDIX 36 — TRANSCRIPT OF ORAL ARGUMENT BEFORE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, DATED SEPTEMBER 12, 1932 (EXCERPT)

Delaware Boundary Case

Stenographer's Record

Fourteenth Session.

STATE OF NEW JERSEY

vs.

STATE OF DELAWARE.

Oral Argument Before the Special Master.

Baltimore, Maryland

September 12, 1932

DUANE E. MINARD,
for Plaintiff.

CLARENCE A. SOUTHERLAND,
for Defendant.

Appendix 36

[commencing at page 90]

The Master: That would be within the twelve mile circle.

Mr. Southerland: Within the twelve mile circle, and east of the ship channel. The apparent reason was that under the New Jersey Constitution a grant of that sort could not be made without compensation, and it being impracticable to pay compensation, the Government took a Delaware deed and improved the land and is still there under a Delaware title. All I am seeking to [**1214**] point out is the recognition of the claim of both these States to the eastern half within the twelve mile circle. Taking the maps all in all, they show this, the later maps in this section of the country have followed the United States Geological Survey, putting the boundary on the [91] New Jersey shore, which shows at least, an existing dispute with our friends from New Jersey.

There is one feature of that, however, which calls for comment. The argument is made that plaintiff and its citizens have acquired by prescription certain rights, and it is stated that modifications of the common law of England have sprung up. We agree with that undoubtedly. By an early common law of England, no subject could encroach upon the foreshore unless he had a grant for it. That law was wholly unsuited for the development of the American colonies, and the only State we know of that has clung to it in any way is the State of New Jersey. The law is, as laid down by Chief Justice Marshall, that you hold to low water mark, not to high water mark, but the State of New [**1215**] Jersey holds tenaciously to the theory that it owns the foreshore.

Undoubtedly modifications have sprung up. In *Gough v. Bell*, a New Jersey case, the Court seems to limit it to low water mark. We say it is undoubtedly true in the State of Delaware and in most of the American colonies that the upland owner had the right to wharf out and that right was not adverse to the owner of the soil. When you build a wharf on the State's land at New Castle, or Rehoboth, or somewhere on the Delaware shore, you are not trespassing on the property of the State of Delaware. The State of Delaware gives you that right subject only that you must not either by State or Federal law obstruct navigation.

We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do. Therefore, we say there is no case here for the ap-[92]plication of any doctrine [**1216**] of prescription, that the evidence that is in simply shows that each State has continuously on every possible occasion asserted its claim to the best of its ability.

My friend complains about the nature of the evidence we have put in showing dominion over the river. Actually there is no evidence, if you please, in this record except the arrest of one or two fishermen by New Jersey of any dominion by the State or Federal Courts of New Jersey. It is impossible for us at this date to discover the issuance of writs one hundred years ago, and the writ itself would show nothing. That testimony was before Mr. Sargeant in the Pea Patch

case and a resume of the testimony is in his opinion. I appreciate that one hundred years have gone by since that decision, but the Supreme Court of the United States has recognized the fact that a long lapse of time since such testimony was available is a good reason for taking the best that can be gotten.

The Master: In connection with that provision of the Compact, there is another provision immediately [**1217**] preceding regarding fisheries. I confess to a good deal of perplexity as to the provision regarding fisheries.

APPENDIX 37 — DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1929

IN THE

Supreme Court of the United States

No. 19 Original. **October Term, 1929.**

STATE OF NEW JERSEY,

Plaintiff.

v.

STATE OF DELAWARE,

Defendant.

Defendant's Requests for Findings of Fact and Conclusions of Law.

REUBEN SATTERTHWAITE, JR.,
Attorney General of the State of Delaware.

CLARENCE A. SOUTHERLAND,
Special Counsel.

Ward & Gray,
Of Counsel.

Appendix 37

The defendant requests the Special Master to find the following facts and conclusions of law:

FINDINGS OF FACT.

1. The territory now comprised within the State of Delaware was originally settled in the seventeenth century by the Dutch and Swedes, the first settlement having been made at Swaanendael by the Dutch near the present town of Lewes, Sussex County, Delaware, in 1631. Subsequent settlements were made by the Dutch and Swedes within said territory prior to 1664.

2. In 1664 the territory now comprised within the State of Delaware, and the settlements then existing and then under the Government of the Dutch, were conquered by the Crown of England. From 1664 until August 24, 1682 (with the exception of a brief period from July, 1673, to February 9, 1674) the said territory and said settlements were administered and governed in all respects as a dependency of the Government and Colony of New York, the proprietary of the New York Colony being during all of said period his Royal Highness James, Duke of York and Albany, the heir presumptive to the Crown of England.

3. The Duke of York, though without record title by letters patent from the Crown for the said territory or for the said powers of government over said territory, had a *de facto* title to and was the *de facto* proprietary of said territory and settlements from the date of the English Conquest in 1664 until the date of his grants to William Penn on August 24, 1682.

Appendix 37

4. On August 24, 1682, the Duke of York granted and conveyed to William Penn by deed of feoffment and also by lease for ten thousand years, the following lands and waters:

> "All That the Town of Newcastle otherwise called Delaware And all that Tract of Land lying within the Compasse or Circle of Twelve miles about the same scituate lying & being upon Ye River Delawarr in America And all Islands in the said River Delaware and the said River and soil thereof lying North of the Southernmost part of the said Circle of Twelve Miles about the said Town."

The said deed of feoffment contained a covenant on the part of the said Duke of York for further assurance of the title thereby conveyed at any time within seven years from the date thereof.

5. On October 28, 1682, formal livery of seisin and delivery of possession of the lands and waters above described in said deed of feoffment was duly made to William Penn by duly authorized attorneys on behalf of the Duke of York, and on the same day the inhabitants of New Castle duly submitted to the government of William Penn. On November 21, 1682, the Government of the Colony of New York, through its duly authorized officers, approved and authorized the transfer to William Penn of the said lands and waters by the Duke of York, and enjoined all magistrates and officers within the limits of the lands thus conveyed to submit to the government of William Penn and yield him obedience.

Appendix 37

6. On August 24, 1682, by deed of feoffment and also by lease for ten thousand years, the Duke of York conveyed to William Penn a tract of land beginning twelve miles south of New Castle, Delaware, and extending southerly to Cape Henlopen. Said deed of feoffment contained a covenant on the part of the said Duke of York for the further assurance of the title thereby conveyed at any time within seven years from the date thereof. On November 7, 1682, livery of seisin and delivery of possession of said lands last referred to was duly made to William Penn by said duly authorized attorneys on behalf of the Duke of York.

7. Immediately following the formal livery of seisin and delivery of possession to William Penn of the lands described in said two deeds of feoffment and two leases above referred to, William Penn organized and established a government for the three counties comprising the Delaware territory. On December 7, 1682, by Act of a joint assembly consisting of representatives from the Pennsylvania Counties and from the Delaware Counties, the three Delaware Counties were annexed to the Province of Pennsylvania.

8. From 1682 until 1701, the three counties of Delaware and the Province of Pennsylvania were governed by a joint legislative assembly. Thereafter, and until the American Revolution, the Colony of Delaware had its own separate legislature, but until the revolution continued to acknowledge William Penn and his successors as proprietaries and governors of Delaware.

9. From 1682 until the American Revolution, William Penn and his successors as proprietaries and governors, and

the respective legislative assemblies above referred to, possessed and enjoyed the lands and waters within the boundaries of the Colony of Delaware as fixed by said deeds of feoffment and leases and exercised full and exclusive control and dominion thereover.

10. On March 22, 1682/3, by Letters Patent under the Great Seal of England, Charles II of England granted to his said brother, the Duke of York, the said lands and waters described in the said two deeds of feoffment and in the said two leases above referred to, which said Letters Patent conveyed said lands and waters in the following language:

> "All that the Town of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen."

11. Said grant of March 22, 1682/3, was so made at the request and at the expense of William Penn, for the benefit of William Penn and delivered to William Penn, in fulfillment

of the covenants for further assurance contained in said deeds of feoffment of August 24, 1682.

12. Said Letters Patent of March 22,1682/3, were never thereafter surrendered, nor was the grant of lands and waters thereby made ever abandoned nor was its validity ever impaired by any act or proceeding.

13. The original of Exhibit 529 in this cause, being a certain document in the State archives of the State of Delaware, at Dover, is in fact the original Letters Patent of March 22, 1682/3, and the seal thereto attached is the Great Seal of England.

14. Prior to the Treaty of Peace between the United States of America and the Kingdom of Great Britain of September 2, 1783, the Province or State of New Jersey had at no time any title to any subaqueous soil of the Delaware River or Bay west of low water mark on the western shore of said Province or State of New Jersey.

15. By Orders in Council of November 13, 1685, and June 23, 1709, the claim of Lord Baltimore to the territory comprised within the three counties of Delaware was finally denied and said orders were never modified or reversed.

16. The said Order in Council of November 13, 1685, and the proceedings incident thereto recognized William Penn as the equitable owner of the Colony of Delaware.

17. By Order in Council of August 9, 1694, and by Letters Patent under the Great Seal of England of August 20,

1694, the title and possession of William Penn to the soil of the Colony of Delaware and the powers of government of William Penn thereover were duly and formally recognized, ratified and confirmed by the Crown of England.

18. By various and sundry acts of the Crown of England, its ministers and officers, from the year 1682 until the year 1776, the title and possession of William Penn to the soil of the Colony of Delaware, and the powers of government of the said William Penn, or his successors, and of the Delaware Assembly thereover were recognized and confirmed.

19. Neither the Crown of England nor its ministers or officers, at any time from the year 1682 until the year 1776, took or instituted any action or proceeding looking to the dispossession of William Penn and his successors from the administration of the government, or from the occupancy and possession of the soil of the Colony of Delaware. By reason thereof, the title of the said William Penn and his successors thereto and their powers of government thereover were ratified and confirmed by the Crown of England.

20. The State of Delaware at all times since 1783 has claimed, asserted and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the compact of 1905 between the States of Delaware and New Jersey. These boundaries include within their limits all that part of the Delaware River lying north of the southernmost part of a circle of twelve-miles radius from the Town of New Castle, Delaware.

Appendix 37

21. At no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey thereto, except as modified by the said Compact of 1905.

22. The State of New Jersey has at all times recognized the existence of a boundary dispute between the State of New Jersey and the State of Delaware, and by the Compact of 1905 between the said States the existence of such a dispute was expressly recognized.

23. That the erection and use of wharves and piers on the easterly side of the Delaware River by inhabitants of the Province of New Jersey and by citizens of the State of New Jersey was not a use of the subaqueous soil of said River hostile or adverse to the ownership of such soil by William Penn and his successors and by the State of Delaware.

24. By the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or affect the boundaries of the respective states.

25. In 1783 the Delaware Bay was navigable by all sailing vessels in practically all parts of said Bay, with the exception of certain shoal waters.

26. There was in 1783 no well defined sailing channel in the Delaware Bay constituting a necessary track of navigation.

27. There was in 1783 no prevailing current or *filum aqua* in the Delaware Bay except tidal currents.

28. Neither the State of Delaware nor the State of New Jersey has exercised exclusive jurisdiction over the disputed territory in the Delaware Bay. The evidence establishes that the oyster beds within the disputed area in and about Ship John Light have been dredged by oystermen licensed by the State of Delaware and by oystermen licensed by the State of New Jersey.

CONCLUSIONS OF LAW.

1. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in law passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

2. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in equity passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

3. By virtue of the long uninterrupted and undisturbed possession by William Penn and his successors of the lands and waters comprised within the metes and bounds fixed in

the title deeds for the Colony of Delaware, William Penn and his successors acquired a good and valid title against the Crown of England to the lands and waters within said metes and bounds.

4. Said Letters Patent of March 22, 1682/3, were valid and effectual in fact and in law to convey the subaqueous soil of the Delaware River within said twelve-mile circle.

5. By the decision and decree of the Lord Chancellor of England in the case of *Penn v. Lord Baltimore,* decided by the Court of Chancery of England in 1750, the title of the successors of William Penn in and to the lands and waters comprised within the metes and bounds of the Colony of Delaware as fixed by its title deeds was adjudicated to be a good equitable title. By the decision and award of John Sergeant, Esq., arbitrator in the *Case of Pea Patch Island,* the title of the State of Delaware to the subaqueous soil of the Delaware River within said twelve-mile circle was adjudicated to be good and valid in law and in equity.

6. The preamble contained in the Act of the Delaware Legislature of February 7, 1794, does not in law constitute an estoppel or election binding upon the State of Delaware with respect to the source of the title of the State of Delaware to any of the lands or waters comprised within the metes and bounds of the State of Delaware.

7. The State of Delaware, upon acquisition of statehood on September 2,1783, succeeded to the title of William Penn, and to the title of the Crown of England, if any, to the lands and waters comprised within the metes and bounds fixed by the said title deeds above described.

Appendix 37

8. The boundaries of the colony of Delaware were fixed and determined by the Letters Patent of March 22, 1682/3, from Charles II of England to the Duke of York, and by virtue of the Treaty of Paris of September 2, 1783, the State of Delaware succeeded to dominion over the soil and waters within said boundaries.

9. The said Letters Patent of March 22, 1682/3, were not in fact or in law surrendered to the Crown, either by virtue of the bill of April 11, 1683, or by virtue of any other act or proceeding whatever.

10. There was in 1783 no well defined deep water sailing channel in the Delaware Bay constituting a necessary track of navigation and the boundary line between the States of Delaware and New Jersey in said bay is the geographical center thereof.

11. As a matter of convenience and necessity, the boundary line between the States of Delaware and New Jersey in that portion of the Delaware River south of the southerly perimeter of the twelve-mile circle and north of the head of Delaware Bay is the geographical center of said river.

Respectfully submitted,

REUBEN SATTERTHWAITE, JR.,
Attorney General of the
State of Delaware.

CLARENCE A. SOUTHERLAND,
Special Counsel.

APPENDIX 38 — REPLY BRIEF OF DEFENDANT ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1933 (EXCERPT, BOUNDARY IN THE TWELVE-MILE CIRCLE)

IN THE

Supreme Court of the United States.

No. 13 ORIGINAL. October Term, 1933.
(No. 19 ORIGINAL. October Term, 1929.)

STATE OF NEW JERSEY

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

Reply Brief of Defendant on Exceptions to Report of Special Master.

PERCY WARREN GREEN,
Attorney General of the State of Delaware

REUBEN SATTERTHWAITE, JR.,
CLARENCE A. SOUTHERLAND,
Special Counsel for the State of Delaware

WARD & GRAY,
Of Counsel.

Appendix 38

[table of contents intentionally omitted]

REPLY BRIEF OF DEFENDANT.

This reply brief will be devoted to answering certain arguments advanced in Plaintiff's first brief and will follow the subject headings in Plaintiff's brief.

Plaintiff's brief, like Defendant's, treats the questions under the two separate headings of "The Boundary Within the Twelve-Mile Circle" and "The Boundary Below the Circle".

BOUNDARY IN TWELVE-MILE CIRCLE

Before considering in detail the specific points advanced in this portion of Plaintiff's brief we desire to invite the Court's attention to the general nature of Plaintiff's claims.

Plaintiff's brief on this branch of the case is devoted, first, to an attempt to establish title by prescription in the State of New Jersey to the subaqueous soil of the Delaware River; and second, to an attack on the Delaware title.

Under part II of the brief under the heading "The Title of the State of New Jersey", Plaintiff apparently concedes that, as found by the Master (Report, p. 8, p. 75, Finding 14), the Province of New Jersey had at no time, prior to statehood, any record title to the subaqueous soil of the Delaware River. No attempt is made to set up a record title from the Crown or from the Duke of York.

Plaintiff, however, claims that in colonial times certain riparian rights came into existence which, it argues, are

inconsistent with the claim of title by the State of Delaware. Plaintiff further argues that the Master's finding that the State of Delaware at all times exercised exclusive jurisdiction and domination over the Delaware River within the twelve-mile circle is not supported by the evidence. Plaintiff further claims that the State of New Jersey, after statehood, as well as the Province of New Jersey before statehood, exercised jurisdiction over the Delaware River and thus acquired title by prescription.

Plaintiff's claim to title to the eastern half of the river within the twelve-mile circle thus rests, according to its brief, solely on prescriptive rights. No suggestion of a record title is made.

We shall now consider the nature of the evidence on which Plaintiff relies to establish prescription.

II. (c) (1). Pages 14-35. Practical Construction of Boundary. Action of Penn and the Proprietors: Estoppel.

Under this heading Plaintiff sets forth quotations from various Exhibits the purport of which is that the inhabitants of West New Jersey were entitled to the use of the Delaware River for navigation. This may be conceded at once. Plaintiff argues that such rights to navigation were entirely inconsistent with the ownership of the subaqueous soil by William Penn as proprietary of Delaware. Plaintiff says, in effect, that the acquisition of title to the subaqueous soil of the river by Penn would "thereby exclude the inhabitants of West Jersey (and later of New Jersey)" from the use of the Delaware River. Therefore, Plaintiff argues, it is contrary to

equity that William Penn, who was a trustee for certain land owners in New Jersey, should claim any advantage, under his grants from the Duke of York to the prejudice of the interests of his associates or *his cestuis que trustent.* Plaintiff concludes (Brief, pp. 32-35) that Penn is thereby estopped to claim title to the subaqueous soil of the Delaware River under his grant from the Duke of York and the Royal Patent to the Duke of York which inured to Penn's benefit.

The entire argument is founded upon a misconception of the nature of the rights acquired by the inhabitants of New Jersey. The right to use the river for navigation is in no way inconsistent with the ownership of the bed thereof by an adjoining State. Instances are common in the United States of the ownership of the entire bed of a river by one State to the entire exclusion of the other State from *title* to the soil of the river. For instance, Maryland owns the bed of the River Potomac. Such ownership, of course, in no way affects the rights of the inhabitants of the other State to use the river for purposes of navigation. The claim that ownership of the soil of the Delaware River by the State of Delaware would exclude the inhabitants of the State of New Jersey from the use of the river needs only to be stated to show its unsoundness. No such claim has ever been made by the State of Delaware. It could not be sustained for a moment.

Yet practically the entire argument in Plaintiff's brief from pages 14 to 35 is devoted to showing that the inhabitants of New Jersey had the use of the Delaware River. This is entirely correct but such use in no sense establishes a prescriptive title to the soil of the river.

Appendix 38

Certain assertions in this portion of the brief which are not supported by the evidence should be briefly noticed. At page 29 it is stated that William Penn never claimed title to any land within a radius of twelve miles east of the river. If by this is meant the New Jersey upland, it is entirely correct. The statement is then made that William Penn "never claimed any part of the river itself".

In our first brief we have pointed out that as early as April, 1683 William Penn instructed his Commissioners to insist on his title to the river, stating that the inhabitants of New Jersey *had the liberty of the river but not the property.* (Exhibit 52, p. 3.)

As stated in our original brief, William Penn in 1701 made a general grant to owners of riparian lands in the town of New Castle of a tract of subaqueous soil extending 600 feet into the Delaware River for the purpose of the erection of wharves, and thereafter nineteen "bank lots" or "water lots" were actually granted to riparian owners. (Exhibits 571-590; 594-610.) If William Penn had title to the western half of the bed of the Delaware River, he likewise had title to the eastern half. The assertion, therefore, that he "never claimed any part of the river itself" is entirely erroneous.

Reference is made to certain instructions of the Crown of March 15, 1683-4 to the Governor of West Jersey respecting the restraint and punishment of pirates. Of course, the enforcement of the Crown laws against piracy in the Delaware Bay or on the high seas has not the slightest relation to the ownership of the subaqueous soil of the Delaware River.

Appendix 38

II. (c) (2). Riparian Rights and Grants. Brief, pp. 35-69. (3). Several and Common Fisheries. Brief, pp. 69-70.

Under these headings of the brief Plaintiff discusses common law rights in tidal waters and certain modifications of the common law that arose in New Jersey and other American colonies.

The argument appears to be made that the acquisition of such rights was in some way inconsistent with the ownership of the soil by William Penn and operated to defeat his title to the bed of the Delaware River east of the main ship channel within the twelve-mile circle.

It is further argued that the use of the subaqueous soil of the river by citizens of New Jersey for the purpose of erecting wharves giving them access to the river is a use of the soil inconsistent with the title of the State of Delaware. From this Plaintiff argues in some way that we cannot understand that thereby *title* to the entire bed of the river east of the ship channel passed to the State of New Jersey by prescription.

The answer to this entire argument is that the use of subaqueous soil by riparian owners in New Jersey for the purpose of erecting wharves to provide access to navigable waters is in no way inconsistent with the ownership of the soil by William Penn or the State of Delaware.

Plaintiff's argument seems to be as follows:

The sovereign owns the foreshore, i.e., the strip of land between high water mark and low water mark. No structure

can be erected on the foreshore or indeed on the subaqueous soil beneath tidal waters without the consent of the sovereign.

This was the law of England but, as Plaintiff has shown, it was never the law of the American Colonies and was never the law of the Colony or State of Delaware. In New Jersey the common law rule that the State owns the foreshore has always been followed, i. e., the riparian owner owns only to high water mark. In Delaware, however, the riparian owner holds to low water mark.

Harlan & Hollingsworth v. Paschal, 5. Del. Ch. 435;

State v. Reybold, 5. Harr. 484, 486.

As Plaintiff correctly says, this modification of the English Law is undoubtedly due to custom and usage. Likewise to custom and usage comes the right of the riparian owner to wharf out to navigable water. This custom and usage became very firmly fixed in American Colonial Law and the law in most of the States of the Union recognizes the right of a riparian owner, in the absence of legislative restriction, to wharf out for the purpose of obtaining access to the navigable portion of the river.

See the discussion in Volume 1, Farmham on "Waters and Water Rights," sections 62-66; and the review of the State decisions by Mr. Justice Gray in *Shively v. Bowlby*, 152 U.S. 1.

The courts of the State of New Jersey, however, not recognizing the *title of* the riparian proprietor below high

water mark, have of necessity somewhat limited these rights. In the State of New Jersey the riparian owner has no title below high water mark. This was the common law of England. The right of the riparian owner in New Jersey to wharf out is not based on any, theory of title to the foreshore or to the subaqueous soil of the river. It is a right which is in the nature of a burden upon the ownership of the foreshore and subaqueous soil. It is a right which is recognized at least as fully, if not more fully, by the laws of the State of Delaware *The holder of such a right does not hold it adversely to the State as the owner of the subaqueous soil but in effect derives it from the State.*

It follows, therefore, that the existence of this right and its use by the erection of a wharf is not an act which is hostile to the State as owner and can not be made the foundation for a claim of adverse possession.

The New Jersey doctrine of riparian rights is stated in *State v. Jersey City*, 25 N. J. Law 525, by Judge Elmer of the New Jersey Supreme Court, as follows:

> "It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains

under the water. It may be granted by the state to a stranger, at any time before it is actually reclaimed and annexed to the upland. Such is unquestionably the common law, and I am aware of no alteration of it in this respect in New Jersey. Some of the judges seem to have expressed a different opinion in the case of *Bell v. Gough*, before the Court of Errors, but no case has been decided which establishes a different doctrine. In that matter, I concur myself with the opinion expressed by Judge Randolph. 2 *Zab.* 491. If the blocks and lots covered with water had been in this case valued and assessed entirely distinct from the upland, I should have felt constrained to hold that the assessment could not be supported."

It is clear that before the New Jersey legislature undertook by various riparian acts to protect the riparian rights of the owners of the upland the common law prevailed and was modified only in so far as the riparian owner actually reclaimed the shore or exercised his riparian right by the actual erection of a wharf.

It follows from the foregoing that the recognition of such riparian rights in colonial times never had the effect of passing *title to the soil* to the riparian owner. *Much less did it have the effect of vesting title in the province of New Jersey to the bed of the river east of the main ship channel.*

We agree with the statement that under colonial usage and custom in both the Province of New Jersey and the Colony of Delaware riparian rights sprang up, unknown to

the English common law. What of it? Such rights are in no wise inconsistent with the fact that the ownership of the subaqueous soil was vested in William Penn, and the recognition of such rights could not avail to change the boundaries of the colonies.

We are here concerned with a question of title and boundaries. If the riparian owner's right to wharf out vested in him no title to the foreshore or the subaqueous soil of the river then the title thereto remained unaffected by the existence of the right. Moreover, that right flowed from custom and usage sanctioned by the proprietaries of both colonies. It is elementary that one who claims a right derived as grantee of another does not hold adversely to the other and can not by the exercise of that right acquire title by adverse possession.

The conclusion, therefore, is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn. It was a right which he and all other proprietaries of American colonies accorded to the inhabitants of those colonies.

Plaintiff is here seeking to establish *title* to the subaqueous soil of the Delaware River east of the main ship channel. Such title can not be established by pointing to the exercise of riparian rights by the inhabitants of the Province of New Jersey. Even if it could be argued that the riparian owner acquired title by adverse possession to the subaqueous soil underneath the wharf erected by him, such adverse

possession would not inure to the benefit of New Jersey and would not shift the boundary line between the States.

To put the matter in another way, the right of the riparian owner to wharf out does not rest upon title to the subaqueous soil, and a claim to ownership of the subaqueous soil by the State of Delaware is not inconsistent with the use of such subaqueous soil by the riparian proprietor for the purpose of wharfing out.

Let us suppose that after a lapse of time a riparian owner who has erected a wharf upon subaqueous soil in front of his property tears down that wharf and does not rebuild it. Surely it can not be said that he holds title to the subaqueous soil which is no longer covered by a wharf. He still has the right to build another wharf, but the ownership of the soil is not thereby changed.

Let us suppose again that a valuable mineral deposit is found in the subaqueous soil of the river within the area circumscribed by the piling of the wharf erected by the owner of the upland. Could it be contended for a moment that the owner of the upland, by virtue of his having erected a wharf, would have any title to such deposits? Clearly not. Nor could the riparian owner contend that by virtue of his long possession of the wharf he had acquired a title by prescription to the subaqueous soil.

Moreover, as pointed out in our original brief, nearly all the New Jersey grants of riparian rights within the twelve-mile circle, and practically all the improvements on the New Jersey shore within the twelve-mile circle, were

made or built after the institution of the prior suit in 1877. The failure of the State of Delaware to attempt to tax these improvements during the pendency of this suit can not be ascribed to laches nor can any acquiescence be imputed to the State during that time.

It should be further noted that the State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned now because it is clearly protected by the Compact of 1905 between the States.

The point of the matter lies in this: That the exercise of riparian rights by the inhabitants of the Province of New Jersey, and by the citizens of the State of New Jersey is in no way adverse to the title of the State of Delaware. The Special Master so held. We quote from his report as follows:

> "The claim of defendant in the case is, to low water mark on the New Jersey shore within the twelve-mile circle and defendant claims that there is nothing inconsistent between the ownership of the subaqueous soil and the exercise of riparian rights along the river front. There is no evidence in the case of any such adverse exercise of rights by riparian owners as could give rise to prescriptive rights on the part of the plaintiff. The number of grants and improvements thereunder made upon the plaintiff's shore were few, as above pointed out, and in no view of the matter could the exercise of riparian rights change

the title to the river or affect the boundary between the plaintiff and the defendant." (Report, pp. 53-54.)

In concluding our discussion of this point we should notice an assertion in Plaintiff's brief to the effect that the State of Delaware "never asserted or claimed title to the bed of the river east of the ship channel until 1872." (Brief, p. 63.)

The Master found on the evidence that from 1682 until the American Revolution William Penn and the Pennsylvania and Delaware Legislative Assemblies exercised exclusive control over the lands and waters within the boundaries of the colonies of Delaware. (Report, p. 74, finding 9.)

The Master further found that since 1783 the State of Delaware has claimed, asserted, and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the title deeds as modified by the Compact of 1905 between the States, and that at no time has it ever abandoned its dominion or jurisdiction or acquiesced in the claim of the State of New Jersey except as modified by the Compact. (Report, pp. 76-77, findings 20-21.)

It would be a tedious process to review all the evidence which disproves the above assertion in Plaintiff's brief and sustains the Master's finding. See Defendant's first brief, pp. 90-105. It will be sufficient here to quote from Plaintiff's own brief statements wholly inconsistent with this contention. On page 121 of Plaintiff's brief Plaintiff argues in effect that there was a subsisting dispute between New

Jersey and Delaware over the boundary line prior to the suit of 1877 and in support thereof cites the Delaware case of *State v. Morris*, 1 Harr. (Del.) 326. The opinion of Chief Justice Harrington in this case shows conclusively the existence of the long pending dispute between the States over the boundary line. We quote the following:

> "The state of Delaware has uniformly claimed the sole and exclusive jurisdiction over the whole of the Delaware bay to low water mark on the Jersey shore, and it has to a certain extent used and exercised jurisdiction over the bay and river by grants of territory, acts of restrictive legislation, and service of process. On the part of the United States there has been no resistance of this claim; but, on the contrary, such acknowledgment of the state's jurisdiction as can be inferred from the acceptance on several occasions of cessions by this state of certain parts of the bay and river for the purpose of erecting forts, piers and breakwaters, for defence against the enemy, or for the protection of commerce. On the part, also, of the state of New Jersey, this claim, though resisted in its full extent, has been partially acceded to and acknowledged, that state having limited her claim of jurisdiction to the main ship channel of the bay. There have been several efforts made by New Jersey to settle this question of boundary between us, and it is to be regretted that our legislature has not acceded to the proposition for a conventional arrangement, or adopted some other course to establish the validity of our claim. So

long back as 1782, John Dickinson, in a message to the general assembly of this state, informed that body that a resolution had been adopted by the legislature of New Jersey appointing commissioners 'for settling and establishing the line of jurisdiction between that state, Pennsylvania and this state;' that commissioners had also been appointed by the state of Pennsylvania; and he gave it as his opinion that such a measure was 'proper to be taken on our part for settling the line of jurisdiction in the bay and river Delaware.' The recommendation was not acted upon by the assembly, and though similar propositions have since been made by New Jersey, they have never been acceded to. The convention went on between New Jersey and Pennsylvania, and resulted in an amicable division of the islands, &c. within the river, and an agreement that each state should enjoy and exercise, under certain restrictions, a concurrent jurisdiction upon the waters of the river; but that all capital and other offences committed on the river, the juridical investigation and determination thereof should be exclusively vested in the state wherein the offender should be first apprehended, arrested or prosecuted.

"In November, 1820, the legislature of New Jersey passed a law authorizing the governor to appoint commissioners to meet commissioners to be appointed by this state for the purpose of settling the boundary line between the states and

defining the jurisdiction of each. The subject was laid before our legislature and referred to a committee, who reported that it was inexpedient at that time to appoint commissioners for this purpose."

In Plaintiff's brief at page 332 it is said:

"Prior to 1835 Chief Justice Harrington of the Delaware Supreme Court discussed this boundary dispute in his decision in State v. Morris (reported as a *note to* Emory v. Collies, 1 Harr. Del. 326), in which he reviewed the controversy between the two states over this boundary line from 1782 to the date of that decision, referring to official action taken by each state during that period."

Finally, on page 343, Plaintiff admits very frankly that:

"The record in this case shows that the river boundary between the two colonies was in dispute as early as 1782, . . ."

The evidence which conclusively shows the continued exercise of dominion over the river by the State of Delaware from the Revolution onward is set forth in detail in our first brief, pages 90 to 105. The bare assertion on page 63 of Plaintiff's brief that the Defendant never asserted or claimed title to the bed of the river east of the ship channel until 1872 is simply contrary to all the facts of the case and contrary to assertions made elsewhere in the same brief.

Appendix 38

One further assertion in this portion of Plaintiff's brief should be noticed. On page 65 it is said:

> "Plaintiff's title and jurisdiction, by prescription, in Delaware river and bay were adjudicated as part of the *res gestae* by *Justice* Washington, in 1825, in *Corfield v. Coryell* (6 Fed. Cas. 546); by *Chief Justice* Tilghman in *Kean v. Rice*, in 1824, (11 Sargeant & Rawl's Rep. 203); and by *Justice* Baldwin, in 1830, in *Bennett v. Boggs* (1 Bald. 60) and in 1836 in (*Gale v. Behling*) (Ex. 219)."

The case of *Corfield v. Coryell*, 4 Wash. C. C. 371, 6 Fed. Cas. 546, so far from sustaining the New Jersey title to the subaqueous soil of the river, expressly holds that no such title existed. We quote the following from that case:

> "The next general question to be considered is, whether the boundaries of the state of New Jersey include the place where the Hiram was seized whilst engaged in dredging for oysters? The grant from Charles II to his brother, the Duke of York, of the territory of which the present state of New Jersey was a part, dated the 12th of March 1663-4, was of all that territory lying between the rivers St. Croix adjoining Nova Scotia, and extending along the sea coast southerly to the east side of Delaware bay, together with all islands, soils, rivers, harbours, marshes, waters, lakes, fishings, huntings and fowlings, and all other royalties, profits, commodities, hereditaments and

appurtenances to the same belonging and appertaining, with full power to govern the same. The grant of the Duke of York dated the 24th of June 1664, to Lord Berkeley, and Sir George Carteret, after reciting the above grant, conveys to them all that tract of land lying to the westward of Long Island and Manhattan's Island, bounded on the east, part by the main sea, and part by Hudson's river, 'and hath upon the west Delaware bay or river, and extendeth southward,' &c. with all rivers, fishings, and all other royalties to the said premises belonging, &c. There is no material difference between these grants as to the boundaries of New Jersey on the westward; and we are of opinion that, although the rule of the law of nations is, that where a nation takes possession of a country separated by a river from another nation, and it does not appear which had the prior possession of the river, they shall each extend to the middle of it; yet, that when the claim to the country is founded, not on discovery and occupancy, but on grant, the boundary on the river must depend upon the just construction of the grant, and the intention of the parties to be discovered from its face. Taking this as the rule, we think the claim of New Jersey under these grants to any part of the bay or river Delaware below low water mark cannot be maintained. The principle here suggested is, we conceive, fully recognized and adopted by the supreme court in the case of Handly's Lessee v. Anthony, 5 Wheat. (18 U. S.) 374. Neither do we conceive that the

> limits of the state can, by construction, be enlarged in virtue of the grant of all rivers, fishings, and other royalties; which expressions ought, we think, to be confined to rivers, fishings and royalties within the boundaries of the granted premises."

The case also holds that the inhabitants of West New Jersey made use of the Bay and River Delaware for the purposes of navigation and fishery. As above pointed out, this right is unquestioned and in no way affects the title of the State of Delaware.

The case of *Kean v. Rice*, 12 Serg. & R. (Pa.) 203, deals with oyster rights in Maurice River Cove, in the Delaware Bay, far outside of the twelve-mile circle. It has nothing to do with the present dispute. The case of *Bennett v. Boggs*, 1 Bald. 60, 3 Fed. Cas. 221, deals with fishing rights in the Delaware River between Pennsylvania and New Jersey, north of the twelve-mile circle, and is likewise not on the point.

The case of *Gale v. Beling*, unreported, will be hereafter discussed. It is sufficient to point out here that the record title of the State of Delaware, based on the Letters Patent of March 22, 1682/3, was not shown to the court, and the charge on the law was therefore founded on an error of fact.

In conclusion we would point out that even if it were true that the possession of subaqueous soil by riparian owners for the purpose of erecting wharves were hostile or adverse to the State of Delaware the only result would be that such wharf owners would acquire good title against the State of

Delaware by adverse possession. But such adverse possession could not avail to transfer title to such wharf lands to the State of New Jersey. The land would be owned in private ownership by the riparian owners but would still be within the boundaries of the State of Delaware. Much is said by the Plaintiff, in this portion of the brief, of the great value of these wharf rights on the New Jersey side. The implication in the brief is that if the boundary line between the States is determined to be low-water mark on the New Jersey shore the interests of the riparian owners will be either destroyed or seriously prejudiced. This, of course, is simply not the fact. The Compact of 1905 above referred to recognized the rights of riparian owners in the river to wharf out, and the Master so found.

We quote the following from his report:

> "By the Compact of 1905 (Exhibit 53) the two States agreed, among other things, each with the other as follows
>
> 'Art. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.
>
> 'Art. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.'

Appendix 38

"Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide." (Report, p. 54.)

II. (c) (4). The Circular Boundary. Brief, pp. 70-88.

Plaintiff's brief discusses the origin and development of the twelve-mile circle, and the point is made that the circle originated in an arc starting on the Delaware River and running to the intersection of the arc with the fortieth degree of northern latitude. This is undoubtedly correct. Plaintiff then proceeds to argue that when the deeds of feoffment were executed it was the intention merely to preserve the arc as a boundary between Delaware and Pennsylvania and that the word "circle" did not mean "circle" but was merely descriptive of the boundary between Delaware and Pennsylvania.

This argument is defeated by the wording of the deed of feoffment. In conveying the bed of the river the language used is: "the said river and soil thereof lying north of the southernmost part of the said circle of twelve miles about the said town." Obviously if the circle was intended to be only an arc between New Castle County, Delaware, and Delaware County, Pennsylvania, the above quoted language would be meaningless. To give it any meaning at all it is necessary to extend the circle to the New Jersey shore.

In this portion of the brief Plaintiff also discusses various surveys of the circular line. It is quite natural that any survey

should refer to the circle as beginning on the westerly side of the Delaware for the obvious reason that a survey of a boundary line in a navigable river would be a useless proceeding as the boundary could not be marked in the river.

Considerable stress is laid on the fact that in referring to Delaware various documents speak of the Colony of Delaware as lying "on the west side of said river and bay". Numerous instances of this sort are quoted at great length.

We are unable to see how a reference to the Colony of Delaware as lying on the western side of the Delaware River and Bay raises any inference that the charter to the Colony of Delaware did not include the bed of the river. Yet this seems to be the inference that Plaintiff seeks to draw.

All of the argument under this heading, however, is beside the point. If the river was included in the deed what difference does it make whether the northern arc of the circle was regarded as extending to the New Jersey shore? The point of the matter is that the deed clearly conveyed the bed of the Delaware River north of the southern arc of the circle.

II. (c) (5). Boundary Laws and Maps. Brief, pp. 89-107.

Plaintiff's brief discusses in detail the various maps in evidence, which are styled "boundary maps." We repeat, as stated in our original brief, that none of the old maps of Delaware and New Jersey undertook to fix the boundary at all, and the inference that Plaintiff seeks to draw (Brief, p. 346), that a map maker would have indicated any boundary

fixed by grant, presupposes a knowledge of the various colonial grants which no map maker would be likely to have. In fact some of the maps in evidence upon which Plaintiff lays great stress show an incorrect boundary between Maryland and Virginia.

The maps in evidence in the preparation of which great care was taken accurately to ascertain boundaries are the United States Geological Survey maps (Exhibits 720, 724, 726), which show the eastern boundary of Delaware on the New Jersey shore within the twelve-mile circle. These maps have been followed generally by map makers in this section. (Exhibits 721, 722, 723.)

In *Louisiana v. Mississippi*, 202 U. S. 1, 55-56 this Court recognized as of evidential value a bulletin of the United States Geological Survey discussing State boundaries.

II. (c) (6). Exercise of Jurisdiction. Brief, pp. 108-123.

Under this heading Plaintiff's brief discusses the exercise of jurisdiction over the Delaware River by the provincial and state governments of New Jersey and Delaware.

There is considerable discussion of the enforcement of the Admiralty laws by the Crown authorities in the Delaware River and Bay. This is beside the point. Admiralty powers were exercised by the Crown authorities and the Admiralty Courts were Royal Courts. Such powers were exercised alike over proprietary governments and Crown colonies. The exercise of such powers was in no sense inconsistent

with the ownership of the soil of the river by one of the colonial proprietaries.

Plaintiff details certain instances of the exercise of jurisdiction by the State of New Jersey. The principal instances cited are cessions of lands to the United States in the Delaware River and certain arrests for violation of the New Jersey fishing laws. The record shows an equal number of cessions by the State of Delaware to the Federal Government within the twelve-mile circle. See our first brief, pp. 99-100. In view of the well-known boundary dispute between New Jersey and Delaware it is not surprising that the United States Government should have sought to obtain cessions from both States. This fact is merely a proof of the continued existence of the dispute.

One of the instances of the arrest of fishermen in the Delaware River is subsequent to the Compact of 1905 and the other one occurred during the pendency of the prior suit between the States.

These are all of the instances which the Plaintiff is able to cite of the exercise of jurisdiction by the State of New Jersey within the twelve-mile circle on the Delaware River.

On the other hand the record on behalf of the State of Delaware is replete with instances where process issued by Delaware courts has been served on vessels in the eastern half of the Delaware River within the twelve-mile circle. See the extract from Mr. Sergeant's opinion in the case of Pea Patch Island quoted in our first brief, pages 96 to 98, and numerous instances of the service of process on boats

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on the New Jersey side of the main ship channel within the twelve-mile circle testified to by the witnesses in the prior suit between the States. (First brief, pp. 98-99; Exhibits 691, 698, 700, 702, 704, 706, 710, 714, 718.)

Commenting on this testimony, which is conclusive as to the actual exercise of jurisdiction by the Delaware courts, Plaintiff's brief says:

> "The testimony of witnesses in that case in 1905, even though they are all dead, is not admissible in this case on another issue a quarter of a century later. 1 *Greenleaf on Evidence*, 201. It should be disregarded by the court."

Plaintiff apparently concedes the rule that the testimony of a deceased witness in a former trial between the same parties dealing with the same issue is admissible, if the right of cross-examination has been accorded. It is contended, however, that the present case does not present the same issue as the prior suit.

It therefore becomes necessary to examine the pleadings filed in the former suit to determine what were the issues there presented to the court. The bill of complaint filed by the State of New Jersey and the answer of the State of Delaware are found in Exhibit 693. The second paragraph of the bill of complaint reads, in part, as follows:

> "That your orator is the owner in fee simple of a portion of the bed of the Delaware river, that is to say, from the southeasterly corner of the State

of Pennsylvania, on said river, down said river to and into Delaware bay. That within the limits aforesaid, your orator's part of the bed of said river extends from the New Jersey shore thereof to the middle of said river." (Exhibit 693, p. 1.)

The bill of complaint derives the title of the State of New Jersey to the eastern half of the river from the Crown of England at the time of the Treaty of Paris of 1783.

In paragraph J of the bill the following appears:

"J. By the American Revolution which took place by the declaration of Independence bearing date the 4th day of July 1776, the State of New Jersey became, and was, and from thence forth has been a free and independent state, and as such became entitled to have and to hold such rights as free and independent states may have or hold, to do all acts and things which independent states may of right do, and by force of the said revolution and said independence the said State of New Jersey became invested not only with all and every power of government in and over the territory of said state and the tide-waters adjacent thereto, but also became invested with all the property, and rights of property, within and appertaining to said state, which immediately before said revolution were vested in the crown of England; that at the time the said revolution took place the bed of the River Delaware in its whole width and length, from the falls in said river

at or near Trenton, to the mouth of said river—that is, throughout the whole extent to which the tide ebbed and flowed in said river-belonged to and was vested in the crown of England in trust for the uses and purposes of the subjects of the King of Great Britain; that by means of the said revolution, the said independence of the State of New Jersey, and the treaty of peace between the King of Great Britain and the United States of America, concluded at Paris, Sept. 3rd, 1783, that portion of the bed of the Delaware River, last therein before mentioned, situate between the States of New Jersey and Delaware, to the middle of said River, became vested in fee simple in the State of New Jersey; the remaining portion thereof, by the same means and at the time being vested in the State of Delaware; and so the title to the bed of said river, your orator respectfully submits, hath ever since continued and now is." (Exhibit 693; p. 17.)

In paragraph K of the bill (Exhibit 693, p. 19) it is alleged that the State of New Jersey has title to the bed of the Delaware River as claimed by a long, peaceable and undisputed possession, use, and enjoyment.

The prayers of the bill included a prayer *that the true boundary line between the States may be ascertained and established;* and also that the jurisdiction of the State of New Jersey over the Delaware River be ascertained and established. (Exhibit 693, p. 40.)

It is quite true that the particular dispute which precipitated the suit of 1877 was a dispute over fishing rights,

just as the present suit was precipitated by a dispute over oyster beds; but the bill of complaint filed by the State of New Jersey did not limit the Supreme Court of the United States to the adjudication of fishing rights, any more than the present bill of complaint limits the question to the ascertainment of the right to dredge oysters in certain disputed territory. As above pointed out, the bill filed in 1877 specifically put in issue the title and jurisdiction of the States over the bed of the river and prayed that the boundary line be ascertained.

The bill of complaint in the present suit presents the same issues within the twelve-mile circle. It is alleged in paragraph five that the State of New Jersey claims the ownership in fee simple of that portion of the subaqueous soil lying east of the thalweg, and the State of Delaware claims the entire bed of the river to low-water mark on the New Jersey shore within the twelve-mile circle.

The title of the State of New Jersey to the upland is traced to the grant to the Duke of York in 1664, as in the former suit, and the title to the eastern half of the river is derived from the Treaty of Peace with England as alleged in the former bill. (Rec., pp. 5-12.)

The prayers of the present bill are, inter alia, that the true boundary line between the States may be ascertained, declared, and perpetually established. (Rec., p. 17.)

In each case the defendant filed an answer denying the ownership of the State of New Jersey to the eastern half of the river within the twelve-mile circle, each case basing its

title on the deeds of feoffment from the Duke of York and the letters patent to the Duke of York of March 22, 1682/3.

Paragraph 24 of the bill of complaint in the present suit reads as follows:

> "24. The dispute between the plaintiff and the defendant, and their officers and citizens, respectively, concerning the boundary line between the two States in the Delaware River and Bay and concerning the territorial ownership of the bed of said river and bay as between said States, has existed for many years and the question has arisen from time to time and negotiations have been conducted between the plaintiff and the defendant, and between commissions appointed by the Legislatures thereof, respectively, for the purpose of settling the dispute, and the plaintiff, by leave of this court, filed its bill of complaint against the defendant on March 13, 1877, praying that the true boundary line between the plaintiff and the (14) defendant might be ascertained, declared, defined and perpetually established, and that the rights of the parties in the bed of said river and the territorial extent thereof might be ascertained, declared and established. An answer was filed therein on October 14, 1901, and a replication thereto was filed November 26, 1901, but said suit was discontinued by consent of the parties, under the provisions of an agreement or compact between the parties in 1905 and the

question of boundary and territorial ownership were left undetermined." (Rec., p. 13.)

It should be noted that this paragraph asserts that the suit of 1877 was a suit to settle the boundary line between the States. The Plaintiff's bill herein filed has therefore adopted our view of the matter.

The foregoing analysis of the pleadings would seem to make it quite clear that the issue involved in the first suit in 1877 is one of the issues involved in the present suit, viz.: the title of the two States to the easterly half of the Delaware River within the twelve-mile circle from New Castle.

This having been shown, it follows that the testimony to which objection has been made is admissible, it having been given in a judicial proceeding, the right to cross-examine having been accorded, and the witnesses being deceased.

Plaintiff seeks to treat this evidence as not entitled to any consideration because it represents merely the recollection of the witnesses and is not substantiated by court records.

The witnesses were cross-examined and no contention was made that the instances of actual exercise of jurisdiction testified to by them did not take place. Their testimony is not limited to mere expressions of opinion but is positive and clear as to the actual serving of civil process on vessels in the eastern half of the Delaware River within the circle. The original writ of attachment or summons would not itself disclose where the writ was served. The only possible way

to prove where the writ was served was to call the various marshals and deputy marshals who served such writs and the lawyers who knew of the service of the writs in the eastern half of the Delaware River. This was done and their testimony was not impeached or shaken in any respect whatsoever. It is direct and positive evidence in this case of the exercise of civil jurisdiction over the eastern half of the river by the Delaware courts.

Similar testimony was produced in the case of Pea Patch Island before Mr. Sergeant the arbitrator and is summarized by him in the extract from his opinion in our first brief, pages 96 to 98 above referred to.

Not one single instance of the service of a writ of summons or attachment on a vessel in the eastern half of the circle from the United States court for the district of New Jersey is offered by the Plaintiff. In view of this fact and of the evidence above referred to it is not surprising that the Master's finding on this point was as follows:

> "20. The State of Delaware at all times since 1783 has claimed, asserted and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the compact of 1905 between the States of Delaware and New Jersey. These boundaries include within their limits all that part of the Delaware River lying north of the southernmost part of a circle of twelve-miles radius from the Town of New Castle, Delaware." (Report, p. 76.)

Appendix 38

II. (c) (7). The Compact of 1905.

Under this heading Plaintiff's counsel claim that by the Compact of 1905 between the States the State of Delaware ceded to the State of New Jersey "title to the subaqueous soil of the river, within a radius of twelve miles of New Castle, to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used or may develop and use, the subaqueous soil on that side."

We may ask at once: Why, if the Compact intended any such result, did it not expressly so state? The fact is that the Compact of 1905 reserves the question of the boundary line between the States. By the Compact (Exhibit 53) the State of Delaware in Article I ceded to the State of New Jersey authority to serve criminal and civil process over the entire Delaware River, except upon Reedy and Pea Patch Islands, not including, however, vessels moored at wharves on the Delaware side of the river.

By Article III a common right of fishery in the inhabitants of both States was recognized to exist in the Delaware River.

The effect of Article VII of the Compact, quoted in Plaintiff's brief (p. 127) was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.

Article VIII then provides as follows:

> "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

The Master's finding that this Compact in no way affected the boundary line between the States but merely protected the rights of the riparian owners on the Jersey shore is obviously sound. If the Compact intended to cede to New Jersey title to the subaqueous soil it undoubtedly would have so provided.

Plaintiff is here met with an insuperable difficulty. If the Compact of 1905 was a cession of land, the question arises, How much land was ceded? Apparently Plaintiff's counsel contend that there was ceded to New Jersey a vague and uncertain quantity of land "to the extent necessary to accommodate navigation and commerce to the industries which have developed, and used, or may develop and use, the sub-aqueous soil on that side". This is a wholly untenable position. If sound, the boundary line would be forever uncertain. It would depend on the extent to which it may hereafter become necessary to develop and use the lands below low-water mark on the New Jersey shore.

Plaintiff does not specify any line which could be fixed if its contention should be adopted by this Court. What would be the line? Is this Court to investigate to what extent it may hereafter become necessary for riparian owners on the east

bank of the Delaware River to use the subaqueous soil of the river Delaware and fix a line which represents such probable future use? Such a suggestion is without any basis whatever to support it. Moreover, no such suggestion was made by Plaintiff when the case was before the Special Master.

Plaintiff argues that the qualifying phrase in Article VIII "except as herein expressly set forth" refers to a cession of land. The phrase obviously refers to the "jurisdiction" over the river which was ceded to New Jersey by Article I of the Compact. Plaintiff argues that the Compact expressly legalized the grants of subaqueous soil by the State of New Jersey. This again is a strained construction of Article VII. The phrase "riparian lands" refers to the upland and perhaps to the foreshore, but not to the subaqueous soil. Compare the following cases

Hart v. Board of Levee Commissioners, 54 Fed. 559;

Bathgate v. Irvine, 58 Pac. 442, 126 Cal. 135;

Rome Railway & Light Co. v. Loeb, 141 Ga. 202; 80 S. E. 785, Ann. Cas. 1915 C. 1023.

"Riparian" lands are "bank" lands; not lands under water.

Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. The boundary line would continue to be low water mark.

Appendix 38

It is safe to say that the construction of the Compact of 1905 now contended for by New Jersey did not occur to its counsel until long after the present suit was instituted.

The Bill of Complaint in this case (Rec., pp. 4-18) sets forthwith great particularity the source of Plaintiff's claim of title to the eastern half of the Delaware River and nowhere mentions the Compact of 1905 as the source of that claim. It is inconceivable that the contention now made could have been overlooked when the bill was filed if there were any basis to support it.

Moreover, the construction placed upon the Compact at all times since its execution and approval by Congress has been the reverse of that now contended for by Plaintiff. Since 1907 the United States has accepted several cessions of subaqueous soil from the State of Delaware east of the ship channel within the circle. It is safe to say that the contention made in Plaintiff's brief in this case is the first time that the idea has ever been advanced that the Compact of 1905 settled the boundary dispute within the twelve-mile circle. Certainly if it had settled the dispute by ceding to New Jersey the eastern half of the river or any part thereof there would have been no occasion whatever for the language of Article VIII of the Covenant which expressly reserves the boundary question from the settlement.

* * * *

APPENDIX 39 — REPORT OF THE SPECIAL MASTER, *NEW JERSEY v. DELAWARE*, OCTOBER TERM, 1933 (EXCERPTS: EXERCISE OF JURISDICTION OVER THE DELAWARE RIVER WITHIN THE CIRCLE, FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATIONS FOR A DECREE)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 11, Original

State of New Jersey,

Plaintiff,

vs.

State of Delaware,

Defendant.

Report of the Special Master.

[table of contents intentionally omitted]

[commencing at page 46]

Exercise of Jurisdiction over the Delaware River Within the Circle.

This Court has in several cases announced the rule that where one State has acquiesced in the exercise of dominion by another over a tract of land for generations, it will be regarded as a recognition of the right and can be overcome only by the clearest and most unquestioned proof.

Thus, in *Indiana v. Kentucky*, 136 U.S. 479, it appeared that for upwards of seventy years, the State of Indiana had failed to lay any claim or assert any title to the disputed territory. This Court said (p. 510):

> "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of

time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.'"

In *Massachusetts v. New York,* 271 U.S. 65, this Court said (p. 95):

> "Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary. Indiana v. Kentucky, 136 U.S. 479; Michigan v. Wisconsin, 270 U.S. 295. Even though the Treaty of Hartford provided 'that no adverse possession of the said lands for any length of time shall be adjudged a disseisin of the Commonwealth of Massachusetts,' it does not affect the interpretation by Massachusetts of her own deeds and acts, or her long continued acquiescence in that interpretation, as persuasive, if not conclusive, evidence of the correctness of the construction which we place upon the deeds themselves."

The foregoing cases show that this Court has applied this rule in cases where there has been continuous dominion asserted by one State for a very long period of time and that assertion of dominion has been acquiesced in by the other State. This principle has no application to a case where each

State has on all occasions asserted its claim and, where occasion has arisen, has litigated and supported it to the best of its ability.

The evidence shows the existence of a dispute between the States of New Jersey and Delaware over the boundary from the beginning of their statehood. It has continued for upwards of a hundred years. Moreover, the Compact of 1905 (Exhibit 53) is in itself evidence of the fact that at the time of signing the Compact the dispute still existed and remained unsettled.

The Acts of the Delaware Legislature of 1801 and 1803 recognized the records of land titles in Pennsylvania under the Penn title as constituting the source of the title of the citizens of the State. (Exhibits 671, 672.) Further resolutions to the same effect are found in the resolution of January 26, 1849 (Exhibit 682), the resolutions of 1895 (Exhibit 683), and the proceedings before the Legislature of 1909 upon the presentation of the letters patent to the State. (Exhibit 541.)

In Scharf's "History of Delaware" and Vincent's "History of Delaware," the boundaries of the State are stated to include the Delaware River within the twelve-mile circle. (Exhibits 501, 503.) In Judge Rodney's monograph upon the early relations of Delaware and Pennsylvania he refers to the grants to Penn from the Duke of York as the source of Delaware's ownership of the bed of the Delaware River within the twelve-mile circle. (Exhibit 297, p. 3.)

The State boundary acts of defendant since 1852 have expressly included within the limits of the State the entire bed of the Delaware River within the twelve-mile circle. (Exhibit 162.)

Appendix 39

A list of the laws relating to fisheries within the twelve-mile circle passed by the defendant is found in Exhibit 679. It was the assertion by the defendant of exclusive dominion over the river within the twelve-mile circle embodied in various fishing laws which resulted in the former suit between plaintiff and the defendant in this Court. (Exhibit 693.)

In the *Case of Pea Patch Island* (30 Fed. Cas. 1123, Fed. Cas. No. 18311), the Delaware Assembly ceded Pea Patch Island to the United States, and in the Arbitration proceeding that was subsequently tried relating to the title conveyed, witnesses appeared to testify on behalf of the United States to Acts of dominion by the State of Delaware.

A summary of the testimony before the Arbitrator is thus stated by him:

> "On the part of Delaware, the evidence is full and complete of the exercise of jurisdiction over that part of the river and islands, as far back as evidence can be expected to go. The process of her courts, and of the courts of the United States sitting in that district, for the arrest of persons and property afloat, has been issued and executed, and continues so to be, quite over to the low water mark on the Jersey side; and this, not occasionally, but habitually, without doubt or question, as a matter of course, whenever applied for. Such arrests have been made of persons and property escaping from above. The cases have been contested upon every ground that ingenuity could suggest, or the zeal of parties prompt; but there

never has been an instance of any one disputing the jurisdiction in the courts, either of the State or of the Union. This must be admitted to be very persuasive evidence. In the absence of proof to the contrary, it must be deemed conclusive.

"Now, this evidence comes from numerous witnesses, of great intelligence and unquestionable credit, well informed upon the subject they speak of, by their pursuits in life, and it coincides (for it did not require support or corroboration) with the proof of particular instances, both by parol and by exemplifications of records, here produced. The exhibition of the evidence at large, or even a considerable part of it, would be tedious and unnecessary. The whole was carefully reduced to writing, and will be preserved. But it is quite impossible to look at the list of witnesses without feeling unbounded confidence that, from their own experience, and from the traditions and other sources of information of the past, which lawyers and judges are obliged to explore, and to follow as their guide, we have the whole knowledge of what has been held and done from an early, perhaps the earliest, period, concentrated and condensed in this body of testimony. With nothing to contradict it, (and there is nothing), one might safely say, such has always been the law of Delaware. Kensey Johns, esquire, for example, above eighty-eight years of age, states 'that he has resided in Newcastle since 1780, now sixty-seven years. He was a practising

Appendix 39

lawyer for twelve years, afterwards chief justice of the supreme court for thirty-eight years, afterwards chancellor of the State, since that time, and at present, living a private gentleman.' Any one else, speaking of him, would add, and, during the whole of this lengthened period, exercising a most wholesome influence, by example and precept, upon the mind and morals of the community he lived in. He says 'it has always been considered and held by the courts, public officers and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the State of Delaware extended to a circle of twelve miles around Newcastle, to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the State of Delaware, over that part of the river Delaware, doubted by any court, public officer or lawyer in Delaware, on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware, to seize vessels and persons in all parts of the river Delaware, within the circle to low water mark on the New Jersey shore, and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware, against the title of Delaware over all such parts.' And, again, 'the State of Delaware, for the whole period of my remembrance, and as far back as my researches extend, has claimed and exercised jurisdiction over the Delaware river and soil thereof, within the circle, to low water mark on the Jersey shore,

and the State has never failed to exercise this jurisdiction when called upon or asked to do so.' Eleven other witnesses, eminent citizens of Delaware, with large means of knowledge, whose names, if repeated, would command respect for their testimony, make similar statements, and some of them give an account of particular cases of arrest and seizure, known to them personally. John Steele, also, a citizen of Pennsylvania, gives an account of his following a vessel down the river, getting process against her from a court in Delaware, and having it executed far over on the east side of the river." (Exhibit 676, pp. 53-56.)

In the suit in this Court in 1877 the defendant produced a number of witnesses, including United States Circuit and District Court Judges and Marshals, to show repeated instances of the exercise of jurisdiction over the entire circle by Delaware to the New Jersey shore. (Exhibit 691.)

On behalf of plaintiff there is likewise offered evidence of acts of dominion since statehood over the river within the circle. New Jersey has made two cessions of land situate within the twelve-mile circle, to the United States, the first in 1907 for the same land ceded by Delaware in the same year. (Exhibits 136-137.) In 1909 New Jersey made a cession for lighthouse purposes for which there appears no Delaware grant. (Exhibit 93.)

In 1917 the War Department applied to New Jersey for a cession of certain lands within the circle near Artificial Island, and it was ruled by the Attorney General of the State that the grant could not lawfully be made. (Exhibit 207.)

Appendix 39

Thereafter, in 1925 and 1927, the United States took two grants from Delaware for land near Artificial Island and one for land near Fort Mott, for which there appear no New Jersey deeds.

In 1823 the State of New Jersey passed acts relating to the boundaries of the counties bordering on the Delaware River which asserted the jurisdiction of the State over all the river to the ship channel. (Exhibits 37-40.)

The plaintiff has also adopted fishing statutes from time to time, a list of which appears in Exhibit 34.

The plaintiff, beginning with 1843, authorized the building of wharves beyond low water mark on its shore of the river within the twelve-mile circle. Five records of such legislative grants appear in Exhibits 41-44, 48, 131-135.

Many other grants of riparian rights by authorities of the plaintiff have been made beginning with 1883. These grants will he found in Exhibits 57-92, 94-97. These grants were all issued, and the improvements erected after the institution of the suit by plaintiff against defendant in 1877, and which was pending until 1905. (Exhibit 53.)

No testimony has been offered on behalf of plaintiff showing the exercise of dominion by it over shipping in the eastern half of the river through the processes of its courts.

Plaintiff has introduced some sixty-one maps of the State of Delaware. (Exhibits 1133, 1136-1138, 1140-1143, 1180.) The object of this evidence is to show that since none of

these maps carries the twelve-mile circle to the New Jersey shore, the maps are negative evidence to the effect that the boundaries of the defendant do not include the Delaware River.

Colonel Lawrence Martin testified concerning some of these maps, (Rec. 686-714) and it will appear from his testimony that on none of the maps offered by plaintiff was any attempt made to fix any boundary between plaintiff and defendant. It would seem that in a controversy involving so many aspects little weight can be given to the absence of a boundary between the States upon particular maps. One map in evidence, as Colonel Martin testified, represents a very careful effort by the map makers to plot the boundaries accurately. This is the United States Geological Survey map which shows the eastern boundary of Delaware on the New Jersey shore within the twelve-mile circle. (Exhibits 720, 724, 726.)

Maps made by the Federal Government under competent authority have been recognized by this Court as of evidential value in the matter of boundaries. *Louisiana v. Mississippi*, 202 U.S. 1, 55-56.

It is contended by plaintiff that the rule of the common law limiting the owner upon the shore to high water mark had been modified and liberalized by the New Jersey decisions and Acts of Assembly, and that this has changed the boundary within the river. But the policy of New Jersey could, of course, not change the title to the river unless this policy gave rise to the actual exercise of rights adversely the defendant.

Appendix 39

The claim of defendant in the case is, to low water mark on the New Jersey shore within the twelve-mile circle and defendant claims that there is nothing inconsistent between the ownership of the subaqueous soil and the exercise of riparian rights along the river front. There is no evidence in the case of any such adverse exercise of rights by riparian owners as could give rise to prescriptive rights on the part of the plaintiff. The number of grants and improvements thereunder made upon the plaintiff's shore were few, as above pointed out, and in no view of the matter could the exercise of riparian rights change the title to the river or affect the boundary between the plaintiff and the defendant.

By the Compact of 1905 (Exhibit 53) the two States agreed, among other things, each with the other as follows:

> "Art. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.
>
> "Art. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary between the plaintiff and the defendant must so provide.

* * *

Appendix 39

[commencing at page 72]

FINDINGS OF FACT.

1. The territory now comprised within the State of Delaware was originally settled in the seventeenth century by the Dutch and Swedes, the first settlement having been made at Swaanendael by the Dutch near the present town of Lewes, Sussex County, Delaware, in 1631. Subsequent settlements were made by the Dutch and Swedes within said territory prior to 1664.

2. In 1664 the territory now comprised within the State of Delaware, and the settlements then existing and then under the Government of the Dutch, were conquered by the Crown of England. From 1664 until August 24, 1682 (with the exception of a brief period from July, 1673, to February 9, 1674) the said territory and said settlements were administered and governed in all respects as a dependency of the Government and Colony of New York, the proprietary of the New York Colony being during all of said period his Royal Highness James, Duke of York and Albany, the heir presumptive to the Crown of England.

3. The Duke of York, though without record title by letters patent from the Crown for the said territory or for the said powers of government over said territory, had a *de facto* title to and was the *de facto* proprietary of said territory and settlements from the date of the English Conquest in 1664 until the date of his grants to William Penn on August 24, 1682.

Appendix 39

4. On August 24, 1682, the Duke of York granted and conveyed to William Penn by deed of feoffment and also by lease for ten thousand years, the following lands and waters:

> "All That the Town of Newcastle otherwise called Delaware And all that Tract of Land lying within the Compasse or Circle of Twelve miles about the same scituate lying & being upon Ye River Delaware in America And all Islands in the said River Delaware and the said River and soil thereof lying North of the Southermost part of the said Circle of Twelve Miles about the said Town."

The said deed of feoffment contained a covenant on the part of the said Duke of York for further assurance of the title thereby conveyed at any time within seven years from the date thereof.

5. On October 28, 1682, formal livery of seisin and delivery of possession of the lands and waters above described in said deed of feoffment was duly made to William Penn by duly authorized attorneys on behalf of the Duke of York, and on the same day the inhabitants of New Castle duly submitted to the government of William Penn. On November 21, 1682, the Government of the Colony of New York, through its duly authorized officers, approved and authorized the transfer to William Penn of the said lands and waters by the Duke of York, and enjoined all magistrates and officers within the limits of the lands thus conveyed to submit to the government of William Penn and yield him obedience.

6. On August 24, 1682, by deed of feoffment and also by lease for ten thousand years, the Duke of York conveyed to William Penn a tract of land beginning twelve miles south of New Castle, Delaware, and extending southerly to Cape Henlopen. Said deed of feoffment contained a covenant on the part of the said Duke of York for the further assurance of the title thereby conveyed at any time within seven years from the date thereof. On November 7, 1682, livery of seisin and delivery of possession of said lands last referred to was duly made to William Penn by said duly authorized attorneys on behalf of the Duke of York.

7. Immediately following the formal livery of seisin and delivery of possession to William Penn of the lands described in said two deeds of feoffment and two leases above referred to, William Penn organized and established a government for the three counties comprising the Delaware territory. On December 7, 1682, by Act of a joint assembly consisting of representatives from the Pennsylvania Counties and from the Delaware Counties, the three Delaware Counties were annexed to the Province of Pennsylvania.

8. From 1682 until 1701, the three counties of Delaware and the Province of Pennsylvania were governed by a joint legislative assembly. Thereafter, and until the American Revolution, the Colony of Delaware had its own separate legislature, but until the revolution continued to acknowledge William Penn and his successors as proprietaries and governors of Delaware.

9. From 1682 until the American Revolution, William Penn and his successors as proprietaries and governors, and

the respective legislative assemblies above referred to, possessed and enjoyed the lands and waters within the boundaries of the Colony of Delaware as fixed by said deeds of feoffment and leases and exercised full and exclusive control and dominion thereover.

10. On March 22, 1682/3, by Letters Patent under the Great Seal of England, Charles II of England granted to his said brother, the Duke of York, the said lands and waters described in the said two deeds of feoffment and in the said two leases above referred to, which said Letters Patent conveyed said lands and waters in the following language:

> "All that the Towne of Newcastle otherwise called Delaware and the fort therein or thereunto belonging scituate lying and being between Maryland and New Jersey in America And all that Tract of land lying within the Compasse or Circle of twelve miles about the said Towne Scituate lying and being upon the River of Delaware and all Islands in the said River of Delaware and the said River and Soyle thereof lying North of the Southermost part of the said Circle of twelve miles about the said Towne And all that Tract of Land upon Delaware River and Bay beginning twelve miles South from the said Towne of Newcastle otherwise called Delaware and extending South to Cape Lopen."

11. Said grant of March 22, 1682/3, was so made at the request and at the expense of William Penn, for the benefit of William Penn and delivered to William Penn, in fulfillment

of the covenants for further assurance contained in said deeds of feoffment of August 24, 1682.

12. Said Letters Patent of March 22, 1682/3, were never thereafter surrendered, nor was the grant of lands and waters thereby made ever abandoned nor was its validity ever impaired by any act or proceeding.

13. The original of Exhibit 529 in this cause, being a certain document in the State archives of the State of Delaware, at Dover, is in fact the original Letters Patent of March 22, 1682/3, and the seal thereto attached is the Great Seal of England.

14. Prior to the Treaty of Peace between the United States of America and the Kingdom of Great Britain of September 2, 1783, the Province or State of New Jersey at no time any title to any subaqueous soil of the Delaware River or Bay west of low water mark on the western shore of said Province or State of New Jersey.

15. By Orders in Council of November 13, 1685, and June 23, 1709, the claim of Lord Baltimore to the territory comprised within the three counties of Delaware was finally denied and said orders were never modified or reversed.

16. The said Order in Council of November 13, 1685, and the proceedings incident thereto recognized William Penn as the equitable owner of the Colony of Delaware.

17. By Order in Council of August 9, 1694, and by Letters Patent under the Great Seal of England of August 20,

1694, the title and possession of William Penn to the soil of the Colony of Delaware and the powers of government of William Penn thereover were duly and formally recognized, ratified and confirmed by the Crown of England.

18. By various and sundry acts of the Crown of England, its ministers and officers, from the year 1682 until the year 1776, the title and possession of William Penn to the soil of the Colony of Delaware, and the powers of government of the said William Penn, or his successors, and of the Delaware Assembly thereover were recognized and confirmed.

19. Neither the Crown of England nor its ministers or officers, at any time from the year 1682 until the year 1776, took or instituted any action or proceeding looking to the dispossession of William Penn and his successors from the administration of the government, or from the occupancy and possession of the soil of the Colony of Delaware. By reason thereof, the title of the said William Penn and his successors thereto and their powers of government thereover were ratified and confirmed by the Crown of England.

20. The State of Delaware at all times since 1783 has claimed, asserted and exercised exclusive dominion and jurisdiction over the lands and waters within the boundaries fixed by the said title deeds, as modified by the compact of 1905 between the States of Delaware and New Jersey. These boundaries include within their limits all that part of the Delaware River lying north of the southernmost part of a circle of twelve-miles radius from the Town of New Castle, Delaware.

21. At no time has the State of Delaware ever abandoned its claim, dominion or jurisdiction over the Delaware River within said twelve-mile circle, nor has it at any time acquiesced in the claim of the State of New Jersey, thereto, except as modified by the said Compact of 1905.

22. The State of New Jersey has at all times recognized the existence of a boundary dispute between the State of New Jersey and the State of Delaware, and by the Compact of 1905 between the said States the existence of such a dispute was expressly recognized.

23. By the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or affect the boundaries of the respective states.

24. The record establishes that as early as Fisher's Chart of Delaware Bay (1756) there has been a well-defined channel of navigation up and down the Bay and River. This channel has, since the Revolution, been regularly marked by the government.

25. That Delaware River and Bay, on account of shoals, are not equally navigable in all directions, but the main ship channel must be adhered to for safety in navigation.

26. The testimony shows that the Bay is only an expansion of the lower part of the Delaware River; that the current in the Bay is mainly tidal; but the testimony shows that there is a flow of water through the Bay and that a maximum current velocity is found in the ship channel.

27. Approximately two billion cubic feet of fresh water per day drains into the Bay. It does not spread out uniformly. Observations have proved that it tends to concentrate along the Delaware shore of the Bay. By dividing the channel between the capes into three nearly equal parts observations show that about five times as much fresh water comes down the southerly channel as does the northern channel along the New Jersey shore.

CONCLUSIONS OF LAW.

1. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in law passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

2. By virtue of the issuance of the Letters Patent of March 22, 1682/3, a good title by estoppel in equity passed to William Penn for the lands described in said Letters Patent, including the subaqueous soil of the Delaware River within the twelve-mile circle.

3. By virtue of the long uninterrupted and undisturbed possession by William Penn and his successors of the lands and waters comprised within the metes and bounds, fixed in

Appendix 39

the title deeds for the Colony of Delaware, William Penn and his successors acquired a good and valid title against the Crown of England to the lands and waters within said metes and bounds.

4. Said Letters Patent of March 22, 1682/3, were valid and effectual in fact and in law to convey the subaqueous soil of the Delaware River within said twelve-mile circle.

5. By the decision and decree of the Lord Chancellor of England in the case of *Penn v. Lord Baltimore*, decided by the Court of Chancery of England in 1750, the title of the successors of William Penn in and to the lands and waters comprised within the metes and bounds of the Colony of Delaware as fixed by its title deeds was adjudicated to be a good equitable title. By the decision and award of John Sergeant, Esq., arbitrator in the *Case of Pea Patch Island*, the title of the State of Delaware to the subaqueous soil of the Delaware River within said twelve-mile circle was adjudicated to be good and valid in law and in equity.

6. The preamble contained in the Act of the Delaware Legislature of February 7, 1794, does not in law constitute an estoppel or election binding upon the State of Delaware with respect to the source of the title of the State of Delaware to any of the lands or waters comprised within the metes and bounds of the State of Delaware.

7. The State of Delaware, upon acquisition of statehood on September 2, 1783, succeeded to the title of William Penn, and to the title of the Crown of England, if any, to the lands and waters comprised within the metes and bounds fixed by the said title deeds above described.

Appendix 39

8. The boundaries of the colony of Delaware were fixed and determined by the Letters Patent of March 22, 1682/3, from Charles II of England to the Duke of York, and by virtue of the Treaty of Paris of September 2, 1783, the State of Delaware succeeded to dominion over the soil and waters within said boundaries.

9. The said Letters Patent of March 22, 1682/3, were not in fact or in law surrendered to the Crown, either by virtue of the bill of April 11, 1683, or by virtue of any other act or proceeding whatever.

10. The record shows the existence of a well-defined deep water sailing channel in Delaware River and Bay constituting a necessary track of navigation, and the boundary between the States of Delaware and New Jersey in said bay is the middle of said channel.

RECOMMENDATIONS FOR A DECREE.

I recommend the following decree:

1. That within the twelve-mile circle the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware, subject to the Compact of 1905.

2. That the true boundary between the plaintiff and the defendant below the twelve-mile circle shall be adjudged to be the middle of the main ship channel in said river and bay.

It is further recommended that the costs of this suit be equally divided between the two States.

WILLIAM L. RAWLS,
Special Master.

APPENDIX 40 — STATE OF NEW JERSEY
ASSEMBLY BILL NO. A4287,
INTRODUCED JUNE 27, 2005

ASSEMBLY, No. 4287

STATE OF NEW JERSEY

211th LEGISLATURE

INTRODUCED June 27, 2005

Sponsored by:

Assemblyman JOHN J. BURZICHELLI

District 3 (Salem, Cumberland and Gloucester)

Assemblyman DOUGLAS H. FISHER

District 3 (Salem, Cumberland and Gloucester)

Assemblyman JEFF VAN DREW

District 1 (Cape May, Atlantic and Cumberland)

Assemblyman NEIL M. COHEN

District 2 (Union)

Co-Sponsored by:

Assemblyman Caraballo, Assemblywoman Quigley, Assemblymen Stack, Morgan, Chiapone, Eagler, R. Smith, Conaway, Scalera, Conners, Green, Assemblywoman Oliver, Assemblymen Chivukula, Gibson, Prieto, McKeon, Stanley, Assemblywoman Stender, Assemblymen Payne, Cryan, Wisniewski, Steele, Gordon, Assemblywoman Voss, Assemblyman Johnson, Assemblywoman Weinberg, and Assemblyman Vas

Appendix 40

SYNOPSIS

Prohibits investment of certain public funds in financial institutions located in Delaware if that state does not amend its permitting laws to conform to the Compact of 1905.

CURRENT VERSION OF TEXT

As introduced.

A4287 BURZICHELLI, FISHER

AN ACT setting conditions on the investment of certain public funds in financial institutions located in another state and supplementing Title 52 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Notwithstanding any provision of law to the contrary, no assets of any pension or annuity fund under the jurisdiction and control of the Division of Investment in the Department of the Treasury, or its successor, shall be invested in any bank or financial institution which is incorporated, headquartered or chartered in the State of Delaware unless Delaware, within 180 days of the effective date of this act, takes final and binding legislative or executive action to amend its laws to ensure that Delaware does not apply its state regulatory authority to the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River.

2. The State Investment Council and the Director of the Division of Investment shall take appropriate action to sell, redeem, divest or withdraw any investment held in violation of the provisions of this act. This act shall not be construed to require the premature or otherwise imprudent sale, redemption, divestment or withdrawal of an investment, but such sale, redemption, divestment or withdrawal shall be completed not later than one year following the effective date of this act.

3. Within 60 days after the effective date of this act, the Director of the Division of Investment shall submit to the President of the Senate and the Speaker of the General Assembly a report of all investments held as of the effective date of this act which are in violation of the provisions of this act. Every year thereafter, the director shall report on all investments sold, redeemed, divested or withdrawn in compliance with this act.

Each report after the initial report shall provide: a description of the progress which the division has made since the previous report and since the enactment of this act in implementing the provisions of section 1 of this act.

4. This act shall take effective immediately.

STATEMENT

This act requires the Division of Investment in the Department of the Treasury to divest State-administered pension fund investments from banks and financial institutions that administer credit instruments in the State of

Delaware if that state does not take legal steps to amend its laws to ensure that Delaware does not apply its state regulatory authority to the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River. Article VII of the Compact of 1905 gives the State of New Jersey exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shore of the Delaware River. In early February, 2005, the Secretary of the Delaware Department of Natural Resources and Environmental Control exercised power under the state's Coastal Zone Act, 7 Del. Code § 7001, et seq., effectively to block the construction of a proposed $500 million natural gas terminal located in Logan Township, New Jersey. A natural gas company announced plans in 2003 to build the terminal, which would handle three tankers a week and import enough liquefied natural gas to serve five million homes.

A pier at that terminal would extend several hundred yards beyond the low water mark, across the boundary line established by the U.S. Supreme Court in 1934, subject to the Compact of 1905, in order to allow tankers to dock and unload their cargo. The proposed facility would not only provide badly needed natural gas to citizens of New Jersey but bring significant economic benefits to southern New Jersey by way of jobs and economic development. The administrative ruling in Delaware was issued under a Delaware law that was intended to protect Delaware's coastline, but which effectively restricts industrial development and significantly chills other development on the New Jersey shoreline within the twelve-mile circle of New Castle, Delaware.

Appendix 40

Article VII of the Compact of 1905 provides: "Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." The Compact was ratified by Congress in 1907 and is binding on the State of Delaware. Act of Jan. 24, 1907, ch. 394, 34 Stat. 398 (1907).

Delaware has not only invoked its state permitting laws to block the LNG project mentioned above, but it has recently attempted to apply its permitting laws to other economic development projects on the New Jersey shoreline. Delaware's putative control over such projects has retarded, and will continue to chill, economic development along the New Jersey shoreline opposite Delaware.

This bill delays the proposed New Jersey divestiture for 180 days after enactment of the bill. This delay provides Delaware an opportunity to reconsider the extension of its misapplied authority to the New Jersey side of the river. Delaware is requested to amend it laws to ensure that Delaware does not apply its state regulatory authority to the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River.

APPENDIX 41 — DELAWARE HOUSE OF REPRESENTATIVES, BILL NO. 296 (INTRODUCED JUNE 29, 2005)

SPONSOR: Rep. Smith & Sen. McDowell

HOUSE OF REPRESENTATIVES

143rd GENERAL ASSEMBLY

HOUSE BILL NO. 296

AN ACT TO AMEND THE LAWS OF DELAWARE RELATING TO THE PRESERVATION OF THE TERRITORIAL INTEGRITY OF DELAWARE AND THE MARKING OF OUR NORTHEASTERN BOUNDARY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. The Governor of the State of Delaware is authorized to call upon the Delaware National Guard to protect the territorial integrity of the State of Delaware and to block and/or remove any encroachments upon our boundary. The Governor of the State of Delaware is authorized to call upon the Delaware National Guard to defend the sovereign rights of the State of Delaware.

Appendix 41

Section 2. The Governor shall cause boundary markers to be placed on the eastern boundary of the state of Delaware to mark the boundary from the northernmost point between the states of New Jersey and Delaware to the point at which the boundary abandons the low-water mark of the Delaware River and relocates itself to a point in the middle of the Delaware River. For areas which are wetted by the waters of the Delaware River, boundary markers shall be set approximately one-half mile apart and shall be of such a nature as to be visible from the adjacent boundary marker. For areas which are considered land, including but not limited to "Artificial Island" and "Killcohook National Wildlife Refuge", the boundary markers shall be placed approximately one-quarter mile apart and shall be of such a nature as to be visible from adjacent boundary markers. The boundary markers shall clearly indicate that they mark the boundary of the State of Delaware through the display of words, abbreviations, the State Seal, or other similar and appropriate markings.

Section 3. The area now lying within the Sovereign State of Delaware sometimes referred to as the "Killcohook National Wildlife Refuge" shall be named and henceforth forever known as the "Major Robert Kirkwood Tract."

The area now lying within the Sovereign State of Delaware sometimes referred to as "Artificial Island" shall be named and henceforth forever known as the "Mary Vining Tract."

Section 4. Implementation of Section 2 of this Act is subject to appropriation.

Appendix 41

SYNOPSIS

This Act authorizes the Governor to call out the National Guard of the State of Delaware to defend against encroachments upon the territory of the State of Delaware.

The State of New Jersey, having difficulty in some quarters accepting the authenticated boundary of our two states, can benefit from the clear marking of the eastern boundary of the State of Delaware. This Act will accomplish that goal by authorizing the Governor to establish visible boundary markers between the two states so local and state officials in New Jersey will understand where the boundary lays.

This Act further names two parcels of land in the State of Delaware which lay east of the Delaware River after notable Delawareans. Robert Kirkwood was a renowned Revolutionary War commander of Delaware soldiers who helped American forces prevail at the Battle of Cowpens. Mary Vining was a confidant of Caesar Rodney and was nicknamed the "Belle of the Revolution." She maintained the Ridgely House on The Green in Dover.

APPENDIX 42 — PROPOSED SUPPLEMENTAL DECREE, *STATE OF NEW JERSEY v. STATE OF DELAWARE*, ORIGINAL NO. 11

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

NEW JERSEY'S PROPOSED SUPPLEMENTAL DECREE

The Court having rendered its decision on February 5, 1934, determining the boundary between the State of New Jersey and the State of Delaware in the Delaware River within the Twelve-Mile Circle of New Castle, Delaware, to be at the low-water mark on the easterly or New Jersey side of the River, "subject to the Compact of 1905" (291 U.S. 361, 385); the Court having rendered its Decree on June 3, 1935, fixing the boundary line within the Twelve-Mile Circle on the New Jersey side at the mean-low water line, but providing that the "decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states"

(295 U.S. 694, 699); the Court having received briefs and heard oral argument on New Jersey's motion for a supplemental decree; and the Court having issued its Opinion on all issues announced, *ante*, p. ____,

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware.

2. The State of Delaware is enjoined from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle. The State of Delaware is further enjoined from enforcing any conditions attached to any such permits.

3. Except as otherwise provided herein, the Decree of June 3, 1935 shall remain in full force and effect.

F- 134

[redacted], Original

IN THE OCT 27 2005

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Motion To Reopen and for a Supplemental Decree

BRIEF OF THE STATE OF DELAWARE IN OPPOSITION TO THE STATE OF NEW JERSEY'S MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

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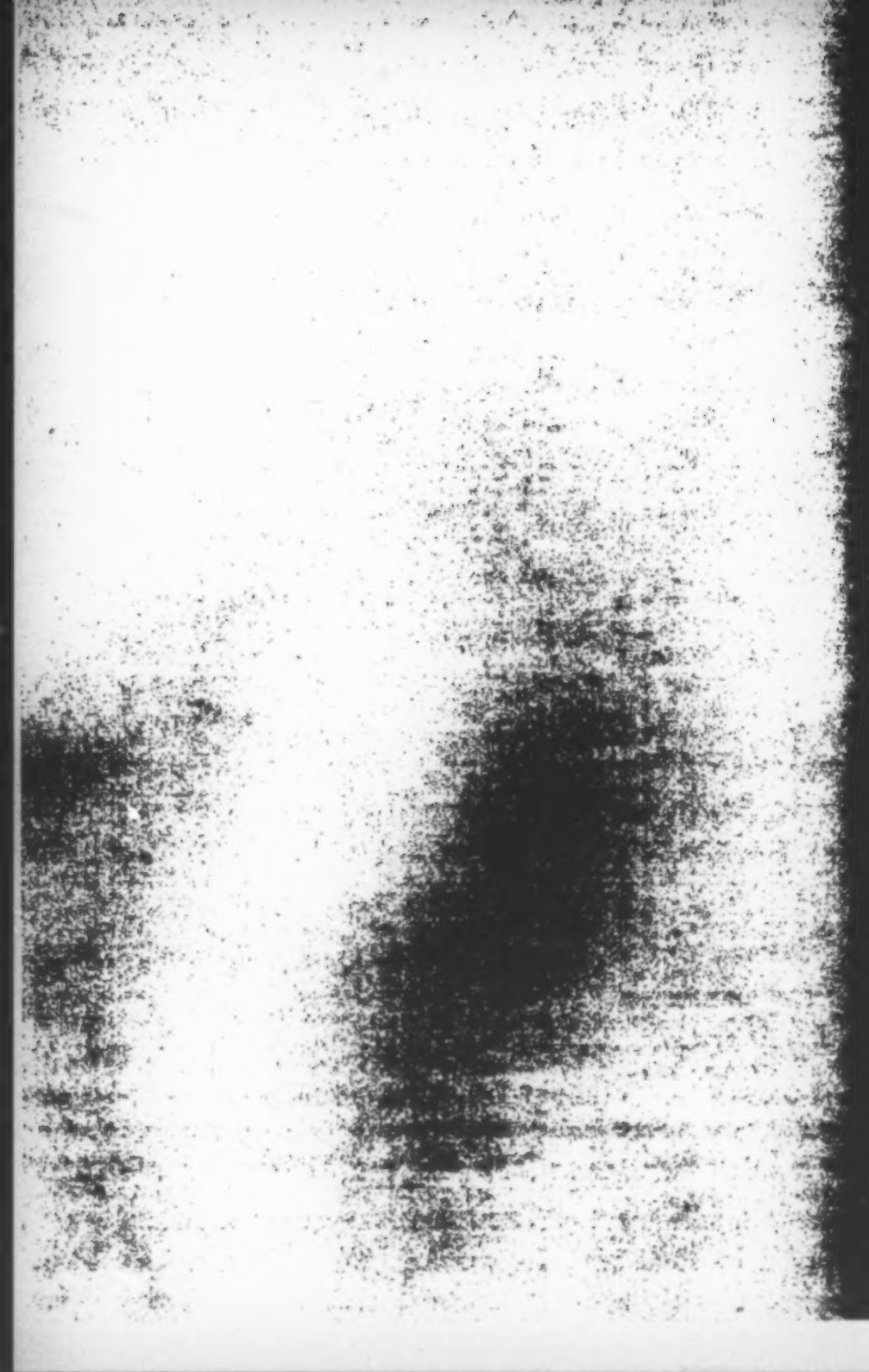

QUESTIONS PRESENTED FOR REVIEW

1. Whether New Jersey has suffered any injury by Delaware's denial of a permit to B.P. p.l.c. ("BP") sufficient to warrant the exercise of this Court's original jurisdiction, when administrative reviews of BP's Crown Landing project are still pending before New Jersey and United States administrative agencies.

2. Whether original jurisdiction exists where BP, not New Jersey, is the real party in interest, and New Jersey could obtain all the benefits of the project by permitting it to be located at another site that does not encroach on Delaware's sovereign territory.

3. Whether a 1905 Compact between Delaware and New Jersey that authorizes each State "on its own side of" the Delaware River to "continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States," gives New Jersey "exclusive" riparian jurisdiction that prohibits Delaware from applying its coastal zone management laws to deny BP's proposal to construct a massive bulk transfer facility on Delaware's subaqueous lands.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES vii

INTRODUCTION 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. Delaware's Sovereignty Over The Delaware River Within The Twelve-Mile Circle 4

B. The 1905 Compact 5

C. The Current Dispute Between BP And Delaware 9

1. Delaware's Permitting Process 14

2. New Jersey's Permitting Process 16

3. The FERC Process for Approval of the Crown Landing Project 17

SUMMARY OF ARGUMENT 21

ARGUMENT 22

I. THE COURT SHOULD DENY NEW JERSEY'S MOTION FOR LACK OF JURISDICTION 22

A. New Jersey's Motion Does Not Invoke This Court's Retained Jurisdiction To Enforce The 1935 Decree 23

B. This Court Lacks Original Jurisdiction Over New Jersey's Motion, Even If Treated As A Motion For Leave To File A New Original Action 25

1. New Jersey cannot demonstrate any "injury" caused by Delaware 25

2. BP, not New Jersey, is the real party in interest 30

C. Even If This Court Has Original Jurisdiction Over New Jersey's Motion, It Should Decline To Exercise That Jurisdiction 32

II. DELAWARE HAS THE AUTHORITY UNDER THE 1905 COMPACT TO REGULATE RIPARIAN STRUCTURES ERECTED ON DELAWARE'S SUBMERGED LANDS 35

A. Prior To The 1905 Compact, Delaware Unquestionably Had The Authority To Regulate Or To Exclude Altogether On Delaware Submerged Lands A Structure Such As BP's LNG Bulk Transfer Facility 36

1. As owner of the tidal lands in question, Delaware holds the lands in a public trust for the people 36

2. Even without a public trust relationship, Delaware has police authority to regulate uses of its submerged lands 40

3. Under New Jersey law, the owner of riparian lands could not build structures on navigable waters on submerged lands the landowner did not own 41

4. Nothing in pre-1905 riparian rights law would have led the States to think that Delaware lacked authority to regulate a massive 2,000-foot-long structure extending onto its sovereign lands 42

B. The 1905 Compact Did Not Alter Delaware's Authority To Regulate Structures Built On Its Subaqueous Lands 45

1. Use of "continue" indicates that the States intended to maintain the status quo 47

2. Use of "on its own side" indicates that the States intended to preserve existing rights pending the outcome of the boundary dispute 49

3. Nothing in the 1905 Compact diminished Delaware's pre-existing authority over its subaqueous lands 53

C. New Jersey's Arguments For "Exclusive" Riparian Jurisdiction Are Unpersuasive 56

1. The States intentionally did not confer "exclusive" authority with respect to riparian rights 56

2. The meaning of "riparian jurisdiction" cannot extend beyond the State's boundary 58

3. New Jersey's invocation of other miscellaneous Compact provisions is unpersuasive 60

4. New Jersey's argument that the States' "contemporaneous construction" of the Compact supports its exclusive jurisdiction has no merit 61

5. New Jersey's reliance on Delaware's alleged "concessions" in the 1934 boundary is misplaced 68

D. *Virginia v. Maryland* Does Not Deny Delaware The Right To Exercise Its Coastal Zone Laws And To Reject A Structure Built On Delaware Subaqueous Lands 72

III. APPOINTMENT OF A SPECIAL MASTER IS WARRANTED IF THE COURT TAKES JURISDICTION OVER THIS CASE BUT CANNOT RESOLVE IT SUMMARILY AGAINST NEW JERSEY 75

CONCLUSION 78

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Arizona, 291 U.S. 286 (1934) 25, 26

Ampro Fisheries, Inc. v. Yaskin, 588 A.2d 879 (N.J. Super. Ct. App. Div. 1991), *aff'd in part and rev'd in part*, 606 A.2d 1099 (N.J. 1992) 7

Arizona v. New Mexico, 425 U.S. 794 (1976) 34

Axline v. Shaw, 17 So. 411 (Fla. 1895) 42

Bailey v. Driscoll, 112 A.2d 3 (N.J. Super. Ct. App. Div.), *aff'd in part and rev'd in part*, 117 A.2d 265 (N.J. 1955) 42, 43, 44, 45

Bennis v. Michigan, 516 U.S. 442 (1996) 71

Bouquet v. Hackensack Water Co., 101 A. 379 (N.J. 1917) 44

California v. Texas, 457 U.S. 164 (1982) 32

California v. United States, 457 U.S. 273 (1982) 77

City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004, 607 A.2d 1163 (Del. 1992) 8

Coastal Barge Corp. v. Coastal Zone Indus. Control Bd., 492 A.2d 1242 (Del. 1985) 55

Cuyler v. Adams, 449 U.S. 433 (1981) 45

Delaney v. Boston, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839) 8

Dutton v. Strong, 66 U.S. (1 Black) 23 (1861) 44

Florida v. Mellon, 273 U.S. 12 (1927) 29

Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945) 28

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 40

Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) 45

Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 1882 WL 2713 (Del. Ch. 1882) 8

Harris v. Elliott, 35 U.S. (10 Pet.) 25 (1836) 46

Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51 (1984) 72

Henderson Bridge Co. v. Henderson City, 173 U.S. 592 (1899) 39

Hoboken v. Pennsylvania R.R. Co., 124 U.S. 656 (1888) 43

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) 40

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 38, 53

Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983) 74

Illinois v. Michigan, 409 U.S. 36 (1972) 27, 30, 34

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 37, 38, 53

Kansas v. Colorado, 543 U.S. 86 (2004) 75

Karam v. New Jersey Dep't of Envtl. Protection, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999) 38

Lee v. Munroe, 11 U.S. (7 Cranch) 366 (1813) 67

Louisiana v. Mississippi, 488 U.S. 990 (1988) 32

Louisiana v. Texas, 176 U.S. 1 (1900) 22, 27, 30

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 28

Main Assocs., Inc. v. B. & R. Enters., Inc., 181 A.2d 541 (N.J. Super. Ct. Ch. Div. 1962) 67

Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367 (1842) 37

Maryland v. Louisiana, 451 U.S. 725 (1981) 31

Massachusetts v. Missouri, 308 U.S. 1 (1939) 25, 29, 30

McGowan v. Columbia River Packers' Ass'n, 45 U.S. 352 (1917) 70

Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291 (1995) 71

Mississippi v. Louisiana, 506 U.S. 73 (1992) 32

Missouri v. Illinois, 200 U.S. 496 (1906) 22

Montana v. United States, 450 U.S. 544 (1981) 36, 37

Nebraska v. Wyoming, 515 U.S. 1 (1995) 75

New Hampshire v. Maine, 532 U.S. 742 (2001) 70, 71, 72, 77, 78

New Jersey v. Delaware:

205 U.S. 550 (1907) 6

291 U.S. 361 (1934) 4, 5, 6, 23, 24, 49, 50, 63, 68

295 U.S. 694 (1935) 1, 5, 23, 24, 70

New Jersey v. New York, 523 U.S. 767 (1998) 45, 75

New York v. Illinois, 274 U.S. 488 (1927) 29

New York v. New Jersey, 256 U.S. 296 (1921) 23, 29

Newark Plank Road & Ferry Co. v. Elmer, 9 N.J. Eq. 754, 1855 WL 122 (N.J. 1855) 43-44

Norfolk & N.B. Hosiery Co. v. Arnold, 45 A. 608 (N.J. 1900) 57

Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987) 55

North Dakota v. Minnesota, 263 U.S. 365 (1923) 25, 30, 31

Northern Pine-Land Co. v. Bigelow, 54 N.W. 496 (Wis. 1893) 41

O'Connor v. United States, 479 U.S. 27 (1986) 46

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 46, 75

Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938) 30

Pea Patch Island, In re, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311) 4

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 25

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 27

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 37

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) 46

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 37

Russello v. United States, 464 U.S. 16 (1983) 57

Shields v. Keystone Cogeneration Sys., Inc., 611 A.2d 502 (Del. Super. Ct. 1991 33

Shively v. Bowlby, 152 U.S. 1 (1894) 37, 43

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 74

State v. Federanko, 139 A.2d 20 (N.J. 1958) 66

State v. Reybold, 5 Harr. 484, 1854 WL 847 (Del. 1854) 8

Stevens v. Paterson & Newark R.R. Co., 34 N.J.L. 532, 1870 WL 5140 (N.J. 1870) 44, 46

Texas v. New Mexico, 482 U.S. 124 (1987) 75

TRW Inc. v. Andrews, 534 U.S. 19 (2002) 56

United States v. Alaska, 521 U.S. 1 (1997) 36, 37

United States v. Cherokee Nation, 480 U.S. 700 (1987) 46

Virginia v. Maryland, 540 U.S. 56 (2003)..... 31, 32, 36, 47, 50, 51, 61, 72, 73, 74, 75, 77

Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) 39

West 205th Street in City of New York, In re, 147 N.E. 361 (N.Y. 1925) 41

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 29, 30, 34

Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1871) 40, 59

ADMINISTRATIVE DECISIONS

Decision and Order, *In re Coastal Zone Status Decision on the Application of Crown Landing LLC*, Appeal No. CZ 2005-01 (Del. Coastal Zone Indus. Control Bd. Apr. 14, 2005) 15, 64

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

Federal

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) 55, 74

Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact).....57

4 Stat. 709-10 57

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 Delaware-New Jersey Compact) .....*passim*

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* 19, 26

Clean Water Act of 1977, § 404, 33 U.S.C. § 1344 ..... 11, 20

Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* 11

16 U.S.C. § 1456(c)(3)(A) 11, 26

Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 13

§ 311(c)(2), 119 Stat. 686 13

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* 13

42 U.S.C. § 4332 ..... 13, 17

Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*:

§ 3(a), 15 U.S.C. § 717b(a) 11, 17

§ 3(d), 15 U.S.C. § 717b(d) 13

§ 3(e)(1), 15 U.S.C. § 717b(e)(1) 13

River and Harbor Act of 1899, § 10, 33 U.S.C. § 403 ..... 11, 20

33 C.F.R.:

Pt. 66 11

Pt. 127 ..... 11, 20

Pt. 325:

§ 325.2(b)(2)(ii) 13

40 C.F.R. § 1501.6 17

Delaware

Del. Const. art. IV, § 11(1)(a) 34

Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* 12

§ 7001 ..... 1, 55

§ 7002(f) 12, 14

§ 7003 ..... 12, 55

§ 7008 ..... 33, 34

Subaqueous Lands Act, Del. Code Ann. tit. 7, ch. 72 61

Underwater Lands Act, Del. Code Ann. tit. 7, §§ 6151-6159 (repealed 1986) 61, 68

Del. Code Ann. tit. 7:

§ 4520 (repealed 1966) 61, 68

§ 6501 (Art. 10, § 10.1) 66

23 Del. Laws ch. 5 (1905) 6

53 Del. Laws ch. 34 (1961) 61, 68

55 Del. Laws ch. 442 (1966) 61

65 Del. Laws ch. 508 (1986) 61

New Jersey

4 N.J. Comp. St., Riparian Rights (1911):

§ 21 9

§ 36 54

§ 37 9

1851 N.J. Laws 335 (Wharf Act) 44

1871 N.J. Laws ch. 307, § 1 54

1905 N.J. Laws ch. 42 6

N.J. Stat. Ann.:

§§ 12:3-1 – 12:3-25 44

§ 12:3-9 49

§ 12:3-10 9

§ 12:3-18 49

§ 12:3-21 49

§ 12:3-22 ..... 9, 49

§ 12:3-23 49

§ 12:3-24 49

§ 12:3-25 49

Tidelands Act, N.J. Stat. Ann. §§ 12:3-1 *et seq.* 13

Waterfront Development Act, N.J. Stat. Ann. § 12:5-3 12-13

Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1 *et seq.* 13

N.J. Admin. Code §§ 7:7E *et seq.* 16

§ 7:7E-3.5 16

§ 7:7E-3.7 16

§ 7:7E-3.15 16

§ 7:7E-3.23 16

§ 7:7E-3.27 16

§ 7:7E-3.38 16

ADMINISTRATIVE MATERIALS

Application of Crown Landing LLC for Section 3 Authorization To Construct Liquefied Natural Gas Import Facility, *Crown Landing LLC*, Docket No. CP04-411-000 (FERC filed Sept. 16, 2004) 17, 31

Crown Landing Response to FERC May 16, 2005 Additional Information Request, Docket No. CP04-411-000 (FERC filed May 26, 2005) 15

Federal Energy Regulatory Commission:

Draft Environmental Impact Statement: Crown Landing LNG and Logan Lateral Projects (Feb. 2005) 10, 11, 17, 18, 19

Draft General Conformity Determination, Crown Landing LNG and Logan Lateral Projects, Docket Nos. CP04-411-000 & CP04-416-000 (Aug. 26, 2005) 19

LNG - Laws and Regulations: States' Rights in Authorization of LNG Facilities (updated Aug. 17, 2005), *available at* http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp 13

Findings of Robert W. Knecht, Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, Approval of the Delaware Coastal Management Program (Aug. 21, 1979) 12

Formal Opinion 1954 – No. 3, 1954 N.J. Op. Atty. Gen. 6 (Feb. 2, 1954) 53, 58, 67

Letter from Michael Chezik, U.S. Dep't of Interior, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 13, 2005) 18

Letter from Clifford Day, U.S. Dep't of Interior, to LTC Robert J. Ruch, U.S. Army Corps of Engineers (Apr. 29, 2005) 20

Letter from John Filippelli, U.S. Environmental Protection Agency, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 14, 2005) 18

Letter from John Hughes, Delaware Dep't of Natural Resources and Environmental Control, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 13, 2005) 19

Letter from Susan Kennedy, National Oceanic and Atmospheric Administration, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 18, 2005) 18

Letter from Kenneth Koschek, New Jersey Dep't of Environmental Protection, to Magalie Salas, Federal Energy Regulatory Commission (Apr. 19, 2005) 19

Letter from David Q. Risilia, Office of Dredging and Sediment Technology, to David Blaha, Environmental Resources Management (Feb. 4, 2005) 16, 65

Letter from David Q. Risilia, Office of Dredging and Sediment Technology, to David Blaha, Environmental Resources Management (July 15, 2005) 16-17

Letter from John Sherman, Planner III, Delaware Planning Office, to Richard Sullivan, Commissioner, New Jersey Dep't of Environmental Protection (Feb. 23, 1972) 63

Letter from Herbert Ward, Attorney General of Delaware, to John Hunn, Governor of Delaware (Jan. 31, 1903) 5-6

Memorandum from David S. Swayze and Michael W. Teichman, Parkowski, Guerke & Swayze (counsel for Crown Landing), to John A. Hughes, Secretary, Delaware Dep't of Natural Resources and Environmental Control (Dec. 7, 2004) 14

Memorandum of Law of Appellant Crown Landing, LLC, *Coastal Zone Act Status Decision published February 3, 2005 in Respect of the Application of the Crown Landing LLC*, Docket No. 2005-1 (Del. Coastal Zone Indus. Control Bd. filed Mar. 23, 2005) 15

New Jersey Dep't of Environmental Protection & National Oceanic and Atmospheric Administration, *New Jersey Coastal Management Program and Final Environmental Impact Statement* (Aug. 1980) 64

Notice of Applications, Crown Landing LLC, 69 Fed. Reg. 59,906 (Oct. 6, 2004) 17

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INTRODUCTION

New Jersey brings this action so that a subsidiary of B.P. p.l.c. ("BP") can build a massive liquefied natural gas ("LNG") processing terminal on lands within Delaware's border, in a coastal area determined by Delaware's General Assembly to be among "the most critical areas for the future of the State in terms of the quality of life." Del. Code Ann. tit. 7, § 7001. The lands are submerged lands owned by Delaware in trust for the people of the State. New Jersey, however, claims that Delaware cannot discharge its responsibilities as a sovereign and trustee because under a 1905 interstate compact Delaware ceded all jurisdiction over these lands for any structure originating on the New Jersey shore. At both the procedural and substantive levels, New Jersey's action is flawed and should be rejected by this Court.

Procedurally, New Jersey improperly invokes this Court's original jurisdiction. New Jersey styles its action as a "Motion to Reopen and for a Supplemental Decree" ostensibly to modify a decree issued by this Court in 1935 that settled a longstanding boundary dispute between the two States. *See New Jersey v. Delaware*, 295 U.S. 694 (1935). This case does not concern the boundary at all, however, but rather the interpretation of a provision concerning the exercise of riparian rights in a 1905 Compact entered into between the two States. The 1935 Decree addressed only the boundary, not the exercise of riparian rights. Even if this Court were to accept New Jersey's alternative form of pleading by treating this case as a complaint proceeding, New Jersey's invocation of the Court's jurisdiction should be rejected. Neither New Jersey itself nor various agencies of the United States government have completed their administrative reviews vetting BP's proposed LNG bulk transfer facility. Given that any of those reviews could result in a rejection of BP's proposal, it is completely speculative at this time that Delaware's decision to reject the proposal is the cause of any injury that BP might suffer. The "injury" to New Jersey is also

speculative, given that alternative sites exist where the facility could be located that would not encroach on Delaware's lands and yet would produce the very same financial benefits to New Jersey and its citizens. In short, this case is being invoked by New Jersey for the commercial convenience of a large corporation that is not even a citizen of that State.

Substantively, New Jersey's action is flawed because the 1905 Compact cannot be read fairly as denying Delaware the authority to regulate the dredging and construction of a massive bulk product transfer facility within its fragile coastal zone. As the law stood prior to 1905, Delaware unquestionably could deny BP permission to build this facility. Nothing in the 1905 Compact changed that result. Rather, Article VII confirmed that each State would "continue to exercise" riparian jurisdiction "on its own side of the river." NJ App. 5a. That language provided that the status quo would remain in place and that, whenever the boundary between the two States was finally resolved, each State would "continue to exercise" jurisdiction within its own border. Nothing in the Compact confers on New Jersey the extraordinary right it seeks here — to approve unilaterally a project that would displace 800,000 cubic yards of Delaware soil on a plot 27 acres large and to bar Delaware from having any say in the matter. The fact that this land borders New Jersey does not warrant a departure from the longstanding principle that each State has sovereign control and public trust obligations over its own lands within its boundary.

JURISDICTION

This Court lacks jurisdiction over New Jersey's Motion to Reopen and for a Supplemental Decree in No. 11, Original. New Jersey does not seek to enforce any provision of this Court's 1935 Decree, which pertained exclusively to the boundary dispute between the States and did not adjudicate their respective powers to define and regulate the exercise of riparian rights. Its Motion therefore does not properly invoke this Court's retained jurisdiction

over that decree. Nor does New Jersey's Motion properly invoke this Court's original jurisdiction, if the Motion is viewed as a request for leave to file a new complaint. New Jersey has not identified any cognizable injury to itself or its citizenry caused by Delaware. Indeed, neither New Jersey nor the United States government has issued all of the permits necessary for federal and state approval of BP's proposed LNG terminal. New Jersey's allegation that Delaware's action has caused injury to New Jersey is therefore premature. Absent a definitive conclusion that the BP project will in fact be approved by the other necessary federal and New Jersey authorities, New Jersey's claim that Delaware's refusal to approve BP's Crown Landing project is causing New Jersey's injury is purely speculative. This Court also lacks jurisdiction because New Jersey is suing to further the interests of a private party — BP — that is not even a New Jersey citizen. But, even if this Court has original jurisdiction over the instant dispute, it should decline to exercise that jurisdiction, because BP, the real party in interest, had (but purposefully declined to pursue) an adequate alternative forum in which to resolve the claims New Jersey presents here and that forum could have produced an appeal ultimately to this Court upon a petition for writ of certiorari. *See infra* pp. 32-35.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by New Jersey, this case involves Article VIII of the 1905 Compact, which states:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

STATEMENT OF THE CASE

A. Delaware's Sovereignty Over The Delaware River Within The Twelve-Mile Circle

Delaware traces its sovereign title to lands within the State's boundary to a 1682 grant to William Penn from the Duke of York. *See New Jersey v. Delaware*, 291 U.S. 361, 365 (1934). That grant embraced the lands within a twelve-mile circle of the New Castle, Delaware courthouse, a description that extended across the Delaware River to points at the low-water mark of the New Jersey shoreline. From the outset, Penn insisted on his ownership of the subaqueous soil of the Delaware River, while acknowledging common rights, such as to navigation on the river. For example, Penn instructed one of his commissioners involved in boundary negotiations with the Province of New Jersey as follows: "Insist upon my Title to ye River, Soyl and Islands thereof according to Grant. . . . They have ye Liberty of ye River, but not ye Propriety." *See id.* at 374.

Between the time of the Duke of York's grant to Penn and this Court's 1934 decision in *New Jersey v. Delaware*, Delaware's sovereignty over the subaqueous land within the twelve-mile circle was upheld in several lawsuits. In a 1732 case, the Lord Chancellor Hardwicke upheld Penn's title against a challenge from Lord Baltimore. *See id.* at 367-68. More than a century later, *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311), affirmed Delaware's sovereignty, in an analysis that this Court later praised as a "careful and able statement of the conflicting claims of right." 291 U.S. at 373, 377.

When the question of Delaware's sovereignty over the Delaware River subaqueous lands came before this Court in the 1930s, after a similar 1877 suit was dismissed in 1907 prior to resolution of the issue, the Court conclusively resolved the long-festering boundary dispute between the two States. The Court held that Delaware has sovereignty over the Delaware River within a circle of 12 miles about the town of New Castle, up to the low-water

mark on the east, or New Jersey, side of the river (the "twelve-mile circle"). *See id.* at 365. The Court rejected each of the bases on which New Jersey claimed title to the subaqueous soil of the Delaware River within the twelve-mile circle. *See id.* at 370-78. Of particular relevance here, the Court rejected New Jersey's claim that a compact entered into between the two States in 1905 caused Delaware to relinquish ownership of the land to New Jersey. *See id.* at 377-78.

On June 3, 1935, the Court entered a decree confirming its determination of the boundary between the States. *See New Jersey v. Delaware*, 295 U.S. 694 (1935). In the decree, the Court retained jurisdiction to issue "any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree, and for the purpose of a resurvey of said boundary line in case of physical changes in the mean low water line within said circle, or in the middle of the main ship channel below said circle, which may, under established rules of law, alter the location of such boundary line." *Id.* at 698. The decree stated that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." *Id.* at 699.

B. The 1905 Compact

New Jersey and Delaware entered into the 1905 Compact after a long dispute between the States over fishing rights. In the spring of 1872, Delaware officials enforcing a Delaware fishing statute arrested New Jersey fishermen on the Delaware River within the twelve-mile circle. New Jersey protested that action and in 1877 filed a complaint in this Court challenging Delaware's exercise of such authority. *See* Lodging, Tab 1, at 6-50 (Rec. 1, No. 1 Orig., Oct. Term, 1884). That case remained dormant for many years until, in 1901, the Clerk of this Court directed that the case should be "forthwith proceeded with." *See id.*, Tab 3, at 4 (Letter from Herbert Ward, Attorney General of Delaware, to John Hunn, Governor of Delaware, at

4 (Jan. 31, 1903)); *see New Jersey v. Delaware*, 291 U.S. at 377.

Concurrent with the litigation in this Court, Delaware and New Jersey appointed commissioners to negotiate a settlement of the case. In 1905, the Delaware and New Jersey legislatures approved the Compact as proposed by the commissioners to resolve the fishing rights dispute within the twelve-mile circle. *See* Lodging, Tab 6 (23 Del. Laws ch. 5; 1905 N.J. Laws ch. 42, p. 67). Congress approved the Compact in January 1907. *See* NJ App. 1a-7a. In April 1907, New Jersey dismissed its complaint. *See New Jersey v. Delaware*, 205 U.S. 550 (1907).

As this Court explained in 1934 when adjudicating the States' boundary dispute, the 1905 Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery," but "[b]eyond that it *does not* go." 291 U.S. at 377-78. Indeed, this Court found New Jersey's assertion that the 1905 Compact cedes Delaware's ownership of the subaqueous lands within the twelve-mile circle to be "wholly without force." *Id.* at 377. In reaching that determination, the Court made special note of Article VIII of the 1905 Compact, *see id.* at 377-78, which expressly states that "[n]othing" in the Compact "shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." NJ App. 5a. This Court's 1935 Decree concerned only title to the Delaware River subaqueous land, and not any rights or authorities of the States that are the subject of the 1905 Compact.

The 1905 Compact contains nine articles. As Delaware's counsel explained in submitting the Compact to the Court as grounds for dismissing the 1877 original action filed by New Jersey, the "main purpose" of the Compact is "to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware

River and Bay." Lodging, Tab 7, at 10 (Statement of Reasons).

Articles I and II resolve the issue that precipitated the filing of New Jersey's complaint in 1877: the arrest, by officials of one State, of citizens of the other State while on the Delaware River within the twelve-mile circle. Those articles set forth each State's jurisdiction to serve criminal process on the river. *See* NJ App. 2a-3a. Delaware and New Jersey can serve process based on crimes committed on, respectively, the western and eastern halves of the river. *See id.* Because the 1905 Compact does not resolve the boundary line within the twelve-mile circle, those Articles also give each State the right to serve process based on "an offense committed upon the soil of said State." *Id.*

Articles III through V create a framework for resolving the other portion of the controversy that had led to New Jersey's complaint: fishing rights. Article III declares the general principle that the inhabitants of both States "shall have and enjoy a common right of fishery" between the low-water marks on the river. *Id.* at 3a-4a. Article IV commits each State to the appointment of commissioners to draft uniform laws to regulate the catching and taking of fish in the Delaware River and Bay. *See id.* at 4a. Those uniform laws, upon adoption, were to become the sole laws regulating fishing in the river and bay. *See id.* Article IV also provides each State, in language that appears only in this article, with "exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery." *Id.* at 5a.[1] Article V permits laws not inconsistent with the common right to fish to continue in force

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[1] The States never effectuated the terms of Article IV. *See, e.g., Ampro Fisheries, Inc. v. Yaskin*, 588 A.2d 879, 883 (N.J. Super. Ct. App. Div. 1991) (describing New Jersey's contention that "the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws"), *aff'd in part and rev'd in part on other grounds*, 606 A.2d 1099 (N.J. 1992).

until the enactment of the concurrent legislation regarding fishery. *See id.*

Article VI provides that Articles III through V do not apply to the oyster and shellfish industries. *See id.* The States agreed to defer resolution of any disagreements regarding those industries. As Delaware's counsel stated to the Court, the Compact is "not a settlement of the disputed boundary, but a truce or *modus vivendi*." Lodging, Tab 7, at 10 (Statement of Reasons). A dispute over oyster beds in the Delaware Bay caused New Jersey to file the complaint in this Court that ultimately resolved Delaware's sovereignty over the lands within the twelve-mile circle.

Article VII addresses each State's power to define and to regulate the exercise of riparian rights, providing that each, "on its own side of the river, [may] continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." NJ App. 5a. At the time of the Compact, New Jersey exercised jurisdiction over riparian lands by statute rather than by common law. *See id.* at 26a-27a (Castagna Aff. ¶ 3).[2] Under the statutory regime in effect at the time, an owner of riparian lands[3] could obtain a "lease, grant or

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[2] At the time of the Compact, Delaware exercised jurisdiction over riparian rights by application of common law. *See, e.g., Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (Del. Ch. 1882); *State v. Reybold*, 5 Harr. 484, 1854 WL 847 (Del. 1854); *Delaney v. Boston*, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839). Delaware continues to recognize riparian rights at common law, subject to the State's "power to regulate or restrict private riparian property rights for public purposes." *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168-69 (Del. 1992).

[3] New Jersey appears to refer to "riparian lands" as submerged lands, *see* Charles S. Boyer, *Waterways of New Jersey: History of Riparian Ownership and Control Over the Navigable Waters of New Jersey* 75 (1915), whereas most States use that term to describe the lands from the shore to the high-water mark or the low-water mark, *see* Robert E. Beck, *Waters and Water Rights* § 7.02(a) (2001 Replacement

conveyance" from New Jersey "of any lands under water in front of his lands," including the right to dredge out to navigable waters, but only on "lands of the state." DE App. 159a, 168a (4 N.J. Comp. St., Riparian Rights §§ 21, 37 (1911) (currently codified at N.J. Stat. Ann. §§ 12:3-10, 12:3-22)).[4] The Compact thus preserves New Jersey's ability to enforce, on "its own side of the river," NJ App. 5a, these statutes governing the use of riparian lands.

Article VIII generally reserved the States' rights, providing that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." *Id.*

Finally, Article IX sets forth a process for execution by the commissioners and ratification by Congress, stating that upon ratification the Compact would become "binding in perpetuity" upon both States and that the suit then pending would be "discontinued" without prejudice. *Id.* at 6a.

C. The Current Dispute Between BP And Delaware

In 2002, BP contacted the Delaware Department of Natural Resources and Environmental Control ("DNREC") regarding a proposal to construct a new LNG terminal on the Delaware River within Delaware's coastal zone, with associated onshore structures in New Jersey. *See* DE App. 4a (Cherry Aff. ¶ 8).[5] Despite the availability of other New Jersey sites outside Delaware's coastal zone, BP preferred the site within Delaware largely because of its proximity to natural gas pipelines.

Volume) ("*Beck's Waters and Water Rights*"); A. Dan Tarlock, *Law of Water Rights and Resources* § 3.35 (2005).

[4] These statutes are largely still in place and are compiled under Title 12 of the New Jersey Statutes entitled, "Commerce and Navigation."

[5] "Cherry Aff." refers to the Affidavit of Philip Cherry, which can be found at DE App. 1a-61a.

Id. On December 4, 2003, BP formally announced its plans to construct the new LNG terminal. *See* BP Press Release, *BP Announces Plans for US East Coast LNG Import Terminal* (Dec. 4, 2003), *available at* http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=2015800. BP expected the terminal to transmit up to 1.2 billion cubic feet of natural gas daily, and to connect to major pipeline systems serving the Northeast. *See id.*

BP's proposed terminal, named the Crown Landing project, would consist of an offshore unloading facility located in New Castle County, Delaware, in the Delaware River, as well as onshore LNG storage and processing tanks and buildings located in Gloucester County, New Jersey. The unloading facility would be designed to handle supertankers with cargo capacities of up to 200,000 cubic meters (more than 40 percent larger than the largest LNG ships in today's world fleet). BP expects that a ship would offload LNG at the facility every two to three days. *See* FERC, *Draft Environmental Impact Statement: Crown Landing LNG and Logan Lateral Projects* at 2-1 (Feb. 2005) ("Draft EIS"). The unloading facility would consist of a structure with a 2,000-foot-long trestle and a 6,000-square-foot unloading platform. *See* DE App. 5a (Cherry Aff. ¶ 14). An LNG transfer system would be installed on the unloading platform to transfer the LNG from the ship to three 150,000-cubic-meter storage tanks located onshore. The transfer system located on a structure built on Delaware's subaqueous lands would consist of three "unloading arms" for transfer of liquid to the storage tanks, an arm for the return of vapor to the ship, a "cryogenic transfer line" connecting the liquid unloading arms to the onshore tanks, a "vapor return line" connecting those tanks to the vapor return arm, and an additional cryogenic line.

Both the unloading structure and the transfer system are within Delaware's coastal zone. *See* Draft EIS at 4-92 ("Because the Crown Landing LNG Project would involve

construction of a new pier *and other facilities* within Delaware's coastal zone . . . , a determination on whether the facilities would be a permissible use under the DSCZA [Delaware State Coastal Zone Act] is required.") (emphasis added). The unloading facility would require the dredging of 800,000 cubic yards of Delaware subaqueous soil,[6] covering an area larger than 27 acres. *See* NJ App. 135a (Segal Aff. ¶ 4); Draft EIS at 2-15; DE App. 5a (Cherry Aff. ¶ 13).

Before it can construct its proposed project, BP must obtain approval from the Federal Energy Regulatory Commission ("FERC") under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a); from the U.S. Army Corps of Engineers ("Corps") under § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, and § 404 of the Clean Water Act of 1977, 33 U.S.C. § 1344; from the U.S. Coast Guard pursuant to Coast Guard regulations, 33 C.F.R. Pts. 66 and 127; and from New Jersey and Delaware under the Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* *See* Draft EIS at 1-4 to 1-10 (listing major permits, approvals, and consultations required for the Crown Landing project).

The CZMA prevents FERC from granting a permit for an activity that affects a State's coastal zone unless the State agrees with the applicant that the activity complies with the State's federally approved coastal management plan, or the Secretary of Commerce specifically finds that the activity is consistent with the objectives of the CZMA or necessary for national security. *See* 16 U.S.C. § 1456(c)(3)(A); *see also* Draft EIS at 4-91 ("any federal action (e.g., a project requiring federally issued licenses or permits) that takes place within a state's coastal zone

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[6] For comparison, 800,000 cubic yards is the rough equivalent of 67,000 to 80,000 dump trucks worth of soil. *See, e.g.*, State of Alaska, Department of Natural Resources, *Fact Sheet: Material Sale in Alaska* (Feb. 2004) ("A standard dump truck has a capacity of 10-12 cubic yards."), *at* http://www.dnr.state.ak.us/mlw/factsht/material_sites.pdf.

must be found to be consistent with state coastal policies before federal action can take place").

Both Delaware and New Jersey have federally approved coastal management programs. Delaware's program includes the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* ("DCZA"), which prohibits "[h]eavy industry uses of any kind" and "offshore gas, liquid or solid bulk product transfer facilities" within the coastal zone, *id.* § 7003. The Act defines "bulk product transfer facilities" as

> any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

Id. § 7002(f). In 1979, the National Oceanic and Atmospheric Administration ("NOAA") concluded that Delaware's coastal management program fulfilled the requirements of the CZMA. *See* Findings of Robert W. Knecht, Assistant Administrator for Coastal Zone Management, NOAA, Approval of the Delaware Coastal Management Program (Aug. 21, 1979) ("Findings").[7] The prior year, 1978, New Jersey's coastal management program had similarly received approval from NOAA. New Jersey's program includes its Waterfront Development Act,

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[7] In its findings on Delaware's program, NOAA noted that some commentators had questioned whether the program "adequately considers the national interest," Findings at 7, and that FERC specifically had expressed concern about the prohibition of bulk transfer facilities, *id.* at 25. However, NOAA concluded that "Delaware recognizes its role in satisfying the national interest," and that the prohibition of certain facilities in a limited area was "justified on the ground of balancing the national need for facilities with the national interest in recreation and preservation of natural resources." *Id.* at 26.

N.J. Stat. Ann. § 12:5-3; Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1 *et seq.*; and Tidelands Act, N.J. Stat. Ann. §§ 12:3-1 *et seq.*[8]

Just as FERC may not approve the Crown Landing project without prior certifications from New Jersey and Delaware, the Army Corps of Engineers similarly may not grant a permit until the applicant demonstrates compliance with state law. *See* 33 C.F.R. § 325.2(b)(2)(ii).

State approval, however, does not dictate the outcome of the federal regulatory process. As the lead agency with respect to the Crown Landing project, FERC is obligated under the National Environmental Policy Act of 1969 ("NEPA") to conduct a detailed review of the project's environmental impact and to consult with other federal agencies. *See* 42 U.S.C. § 4332. The Corps is similarly

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[8] There currently appears to be a disagreement among federal agencies as to whether the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 ("EPA05"), preempts States' regulation of LNG facilities under coastal management plans. *Compare* EPA05 § 311(c)(2), 119 Stat. 686, to be codified at 15 U.S.C. § 717b(d) ("Except as specifically provided in this Act, nothing in this Act affects the rights of States under . . . the Coastal Zone Management Act of 1972"), *with id.* § 311(c)(2), 119 Stat. 686, to be codified at 15 U.S.C. § 717b(e)(1) ("The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."). FERC has stated publicly that EPA05 does not alter States' rights under the CZMA to enforce their coastal management plans with respect to LNG projects. *See* FERC, *LNG – Laws and Regulations: States' Rights in Authorization of LNG Facilities* (updated Aug. 17, 2005), *available at* http://www.ferc.gov/industries/lng/gen-info/laws-regs/state-rights.asp. NOAA, however, has stated that, because of the "'exclusive authority' language [in the EPA05], some State CZMA enforceable policies that NOAA previously approved that would specifically apply to LNG or LNG-type facilities would likely no longer be enforceable for purposes of CZMA [federal] consistency reviews." Office of Ocean and Coastal Resource Management, NOAA, *Summary of Provisions of the Energy Policy Act of 2005 (Pub. L. No. 109-58) Relating to the Coastal Zone Management Act* at 1 (Sept. 23, 2005). Although Delaware believes that FERC's stated position correctly interprets EPA05, it is unclear when this dispute will ultimately be resolved.

obliged to determine whether the project is in the public interest. *See* Notice of Availability of the Draft Environmental Impact Statement, Crown Landing LLC, 70 Fed. Reg. 9297, 9298 (Feb. 25, 2005) ("Notice of Draft EIS") ("Department of the Army permit(s) will be granted by the [Corps] unless it is determined that the proposed work would be contrary to the public interest."). As explained below, neither FERC nor the Corps has completed the necessary review or made the necessary determinations with respect to the Crown Landing project. Moreover, New Jersey itself has not authorized the project under its coastal management program.

1. *Delaware's Permitting Process*

On December 7, 2004, BP formally applied to DNREC for a status determination under the DCZA for its proposal to construct an LNG supertanker terminal partially within the twelve-mile circle. *See* DE App. 5a (Cherry Aff. ¶ 11). In its application, BP claimed that its proposed offshore bulk product transfer facility was permissible under the DCZA. BP argued that its proposed facility fell within the exception from the prohibition on bulk product transfer facilities for "a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use." Del. Code Ann. tit. 7, § 7002(f). BP, however, expressly elected not to raise any claims that, as a result of the 1905 Compact, Delaware lacked jurisdiction to enforce the DCZA with respect to BP's proposed facility.[9]

On February 3, 2005, DNREC issued a status decision determining that BP's proposed project was prohibited

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[9] *See* Memorandum from David S. Swayze and Michael W. Teichman, Parkowski, Guerke & Swayze (counsel for Crown Landing), to John A. Hughes, Secretary, DNREC, at 1 n.3 (Dec. 7, 2004) (accompanying Request for a Coastal Zone Status Decision (Nov. 30, 2004)) (stating that "Crown Landing and BP reserve any and all rights with respect to the relative ability of the State of Delaware to regulate within the riparian jurisdiction granted under the Compact to the state of New Jersey").

under the DCZA. *See* DE App. 6a (Cherry Aff. ¶ 18). On behalf of DNREC, Secretary Hughes found that the "proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a 'manufacturing use' under the Act." *Id.* at 33a (Cherry Aff. Ex. G (DNREC Feb. 3, 2005 Legal Notice)).

On February 15, 2005, BP filed an administrative appeal to the Delaware Coastal Zone Industrial Control Board ("CZICB" or "Board"). Before the Board, BP again claimed only that its proposed facility was permitted under the DCZA and declined to raise any claims it might have based on the 1905 Compact.[10] On April 14, 2005, the Board unanimously affirmed DNREC's status decision. The Board found that the onshore component of the proposed facility was not a manufacturing facility, that the onshore component existed solely to support the offshore component, and that "[t]he real sole purpose of the proposed facility is to serve as a bulk product transfer facility." *Id.* at 57a (Cherry Aff. Ex. H at 7 (CZICB Decision and Order)); *id.* at 6a-7a (Cherry Aff. ¶ 19). The Board therefore concluded that "the proposed construction is absolutely prohibited by the Act." *Id.* at 61a (Cherry Aff. Ex. H at 10 (CZICB Decision and Order)).

BP chose not to exercise its right to appeal the decision of the CZICB to state court. Despite the fact that Delaware's denial of a permit under the DCZA was sufficient to require FERC to deny BP's permit, BP urged FERC to approve the Crown Landing project conditionally. *See* Crown Landing Response to FERC May 16, 2005 Additional Information Request at 3, Docket No. CP04-411-000 (FERC filed May 26, 2005). BP advised FERC that "New

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[10] *See* Memorandum of Law of Appellant Crown Landing, LLC at 1 n.1, *Coastal Zone Act Status Decision published February 3, 2005 in Respect of the Application of the Crown Landing LLC*, Docket No. 2005-1 (CZICB filed Mar. 23, 2005).

Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits" for the Crown Landing project. NJ App. 141a (Segal Decl. ¶ 21).

2. *New Jersey's Permitting Process*

On January 7, 2005, pursuant to New Jersey's Coastal Zone Management Rules,[11] which implement New Jersey's federally approved coastal management plan, BP filed a Waterfront Development Application with the New Jersey Department of Environmental Protection's Office of Dredging and Sediment Technology ("ODST"). Like the permit BP sought under the DCZA, approval of BP's Waterfront Development Application is a necessary precondition to FERC authorization of the Crown Landing project. New Jersey, however, has yet to approve BP's application.

On February 4, 2005, ODST notified BP that its application was deficient. *See* DE App. 84a-138a (Letter from David Q. Risilia, ODST, to David Blaha, Environmental Resources Management (Feb. 4, 2005)). ODST explained that the Crown Landing application lacked sufficient information to demonstrate compliance with numerous New Jersey rules, including, for example § 7:7E-3.5, regarding finfish migratory pathways; § 7:7E-3.7, regarding navigation channels; § 7:7E-3.15, regarding intertidal and subtidal shallows; § 7:7E-3.23, regarding filled water's edge; § 7:7E-3.27, regarding wetlands; and § 7:7E-3.38, regarding endangered or threatened wildlife or plant species habitats.

BP submitted a response to ODST's deficiency letter on May 16, 2005. On July 15, 2005, ODST sent BP a second deficiency letter, stating that its application was still inadequate under the Coastal Zone Management Rules, and accordingly "is not deemed complete for final review at this time, or for a public hearing pursuant to N.J.A.C. 4.4(b)(2)." Letter from David Q. Risilia, ODST, to David

[11] *See* N.J. Admin. Code §§ 7:7E *et seq.*

Blaha, Environmental Resources Management, at 1 (July 15, 2005).

3. *The FERC Process for Approval of the Crown Landing Project*

On September 16, 2004, BP filed with FERC an application under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), requesting that FERC authorize construction of the Crown Landing LNG facility in Delaware's coastal zone. *See* Application of Crown Landing LLC for Section 3 Authorization To Construct Liquefied Natural Gas Import Facility, *Crown Landing LLC*, Docket No. CP04-411-000 (FERC filed Sept. 16, 2004) ("BP September 16, 2004 FERC Application"). On September 29, 2004, FERC issued a "Notice of Applications" and invited comments in support of or in opposition to the project. *See* Notice of Applications, Crown Landing LLC, 69 Fed. Reg. 59,906 (Oct. 6, 2004).

FERC is serving as the lead agency in conducting the environmental review of the Crown Landing proposal required by NEPA. FERC is cooperating with the other agencies whose regulatory responsibilities encompass the project, such as NOAA, the Fish and Wildlife Service ("FWS"), and the Environmental Protection Agency ("EPA"). *See* 42 U.S.C. § 4332 (requiring "the responsible Federal official" to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved"); 40 C.F.R. § 1501.6 ("the lead agency shall . . . [u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency").

On February 18, 2005, FERC released a draft Environmental Impact Statement ("EIS") for the Crown Landing project. The Draft EIS concluded that the adverse environmental impacts of the project would be limited *if* Crown Landing were to adopt FERC's recommended mitigation measures. *See* Draft EIS at ES-9. As part of its

analysis, FERC examined seven alternative sites for an LNG import facility in the mid-Atlantic region. Two of the alternative sites are south of the twelve-mile circle but within Delaware's coastal zone, whereas five are north of the twelve-mile circle and thus outside Delaware's coastal zone (because Delaware borders Pennsylvania at the north end of the twelve-mile circle). *See id.* at 3-32 to 3-41. FERC determined that the various alternatives were not preferable to the Crown Landing site because they did not offer "significant environmental advantages." *Id.* at 3-29; *see also id.* at 3-47 (rejecting pipeline system alternatives because they "would not offer any significant environmental benefits over the proposed facilities").

Several of the cooperating agencies have expressed reservations about the Draft EIS. For example, the Department of the Interior ("DOI") requested that FERC reconsider alternatives such as relocating the facility downriver or offshore in the Atlantic Ocean. *See* Letter from Michael Chezik, DOI, to Magalie Salas, FERC, at 5 (Apr. 13, 2005). DOI concluded that "fish and wildlife issues have not been adequately addressed" by FERC and that "new information is needed to adequately address those issues." *See id.* at 8-9. NOAA recommended that FERC more thoroughly investigate alternatives, *see* Letter from Susan Kennedy, NOAA, to Magalie Salas, FERC, at 5 (Apr. 18, 2005), and that it develop a mitigation plan for the loss of habitat, *see id.* at 4. EPA similarly indicated that it had "environmental concerns and that further information as described above is necessary," because the Draft EIS "does not include detailed mitigation plans, a discussion of general conformity, or thoroughly analyze the cumulative effects on navigation and the environment." Letter from John Filippelli, EPA, to Magalie Salas, FERC, at 3 (Apr. 14, 2005).

Both the New Jersey Department of Environmental Protection ("NJDEP") and DNREC have voiced concerns about the Crown Landing project and the Draft EIS.

NJDEP suggested that FERC consider the alternative of locating the facility offshore and noted that the proposed facility would block as much as 50 percent of the navigable portion of the river to commercial and recreational boating. *See* Letter from Kenneth Koschek, NJDEP, to Magalie Salas, FERC (Apr. 19, 2005).[12] DNREC, in addition to observing that the project is prohibited under the Delaware Coastal Zone Act, pointed out various deficiencies in the Draft EIS's analysis of alternatives. *See* Letter from John Hughes, DNREC, to Magalie Salas, FERC, at 2 (Apr. 13, 2005) ("[t]he Alternatives Analysis section of the [Draft] EIS was broad in scope but lacked specificity . . . [e]nviron-mental impacts were not quantified"). DNREC further observed that it was "premature to evaluate this project" from the perspective of marine safety "due to gaps in information pertaining to safety and security issues": "The U.S. Coast Guard has not weighed in on the feasibility of this project. . . . [I]t seems that the Coast Guard would be far from issuing a letter of recommendation." *Id.* at 4.

Not only has FERC yet to address these and other comments on the Draft EIS and to release a final EIS, it also has yet to complete its analysis of the Crown Landing project with respect to air quality. As required by the Clean Air Act, FERC prepared a Draft General Conformity Determination to assess the Crown Landing project's impact on air quality. *See Draft General Conformity Determination, Crown Landing LNG and Logan Lateral Projects*, Docket Nos. CP04-411-000 & CP04-416-000 (Aug. 26, 2005). FERC specifically noted that, because documentation supporting conformity with the applicable state plans for implementation of the Clean Air Act had not been filed with FERC, FERC's analysis was incomplete and it could not make a determination of conformity. *See id.* at 13.

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[12] The Delaware River is approximately one mile wide at the Crown Landing site. *See* DE App. 142a (Draft EIS at 3-28, Figure 3.3.3-1).

Moreover, the Corps has not yet evaluated whether the Crown Landing project is in the public interest, and therefore has not issued the necessary permits to BP under § 404 of the Clean Water Act, 33 U.S.C. § 1344, and § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403. *See* Notice of Draft EIS, 70 Fed. Reg. at 9298 (explaining that the Corps' decision on whether to issue a permit "will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed projects on the public interest," and that factors considered include "conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply, . . . property ownership, and in general, the needs and welfare of the people"). Just as they did before FERC, federal agencies have urged the Corps to withhold its approval pending further analysis of alternatives and mitigation plans. *See, e.g.*, Letter from Clifford Day, DOI, to LTC Robert J. Ruch, Corps of Engineers, at 1 (Apr. 29, 2005) (summarizing FWS concerns, recommending "that the Corps resolve the below issues prior to any issuance of a Department of the Army (DA) permit," and enclosing copies of the NOAA and DOI comments on the Draft EIS).

Finally, the Coast Guard has yet to approve the Crown Landing project. *See* Crown Landing Informational Website, "What is the current status of the project?," *at* http://www.bpcrownlanding.com/go/doc/569/83864/ (last visited Oct. 21, 2005) ("The US Coast Guard is continuing its review of the river transit issues, working with the Area Maritime Security Committee to review safety and security issues associated with the river transit."); *see also* 33 C.F.R. Pt. 127, "Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas" (establishing safety and security requirements regarding waterfront LNG facilities to be enforced by the Coast Guard).

The various federal agencies involved in considering the Crown Landing project have not issued a timetable for when a decision will be made on the project.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two States. Indeed, New Jersey cannot identify any concrete injury to itself or its citizenry directly caused by Delaware's denial of a permit under the DCZA. Unmentioned in New Jersey's filing is that BP has yet to secure a permit under New Jersey's equivalent Coastal Zone Management Rules, and that FERC and other federal agencies cannot approve the BP plant unless and until the New Jersey permit is issued.

In an attempt to avoid this plain jurisdictional defect, New Jersey claims that its filing merely invokes this Court's retained jurisdiction to enforce its 1935 Decree. But that claim fails because the Decree did not address, much less adjudicate, the nature and scope of each State's riparian rights under the 1905 Compact, which is the ruling New Jersey seeks here. In any event, even if New Jersey had properly invoked this Court's original jurisdiction, this Court should decline to exercise that jurisdiction because BP, the real party in interest, had an adequate, alternative forum in which the issues presented here could have been litigated.

II. If this Court reaches the merits, it should reject New Jersey's broad assertion that it has "exclusive riparian jurisdiction" to approve projects that encroach on Delaware submerged lands without any say by Delaware. The law as it existed prior to 1905 would have rejected that assertion, because States traditionally have sovereignty over lands within their boundaries. The 1905 Compact, which expressly provides that each State shall "continue to exercise" riparian jurisdiction "on its own side of the river," did not alter the background legal rules. Although the parties conferred "exclusive" power in a State in certain circumstances, they did not do so with

respect to riparian rights. Thus, even if New Jersey has jurisdiction to decide certain aspects of riparian projects that traverse both States, the Compact does not divest Delaware of its sovereign right to determine whether a massive bulk transfer facility resting primarily on Delaware lands is consistent with the public trust and state laws implementing that trust.

III. Assuming this Court accepts jurisdiction over this case and chooses not to resolve it against New Jersey on summary grounds in this preliminary round of briefing, the Court should appoint a Special Master, consistent with its practice in comparable cases. A Special Master would be best positioned to consider, in the first instance, evidence about the status of each State's riparian rights within the twelve-mile circle prior to the 1905 Compact, the intent of each State in signing that Compact with respect to riparian rights, and the course of performance during the 100 years since the Compact was approved. A Special Master also would be best positioned to ensure that Delaware's right to pursue discovery on these complex, historical issues is protected.

ARGUMENT

I. THE COURT SHOULD DENY NEW JERSEY'S MOTION FOR LACK OF JURISDICTION

This Court long ago held that its original jurisdiction "is of so delicate and grave a character" that it "was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900); *see also Missouri v. Illinois*, 200 U.S. 496, 521 (1906) ("Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.").

New Jersey's request for declaratory and injunctive relief against Delaware — in which it can identify no con-

crete injury to itself and, instead, seeks only to further the interests of a private party that is not even a New Jersey citizen — cannot satisfy the prerequisites for the exercise of this Court's "extraordinary power under the Constitution to control the conduct of one state at the suit of another." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Apparently recognizing this jurisdictional defect, New Jersey has captioned its request as one to re-open this Court's 1935 Decree resolving a prior boundary dispute between these two States, asserting that the current case is within this Court's retained jurisdiction over the 1935 Decree. New Jersey, however, has no serious argument that the supplemental decree it seeks here is one to "enforce" the 1935 Decree. Nor can New Jersey meet this Court's standard for invoking its original jurisdiction if its petition is to be treated as equivalent to an original complaint.

A. New Jersey's Motion Does Not Invoke This Court's Retained Jurisdiction To Enforce The 1935 Decree

The dispute between Delaware and New Jersey that resulted in the 1935 Decree was exclusively about the *boundary* between the States. *See, e.g.*, 291 U.S. at 363 (explaining that New Jersey "prays for a determination of the boundary in Delaware Bay and river"). To the extent this Court discussed riparian rights in reaching the decision that gave rise to the Decree, such discussion was only in the context of New Jersey's unsuccessful attempt to demonstrate its ownership of the land below the surface of the water. *See id.* at 376-78. Accordingly, this Court's 1935 Decree is limited to establishing the "real, certain, and true boundary line separating the states of New Jersey and Delaware." 295 U.S. at 694. This Court "retain[ed] jurisdiction" insofar as any future orders would be necessary for "the purpose of a resurvey of said boundary line" or "to carry into effect any of the provisions of this decree." *Id.* at 698.

New Jersey's latest dispute with Delaware pertains to riparian rights on subaqueous lands indisputably owned by Delaware. It does not call into question any aspect of this Court's determination of the boundary line between the two States or any other provision of the 1935 Decree. Indeed, New Jersey's motion identifies only two provisions of that Decree, neither of which is relevant to the instant dispute.

First, New Jersey points (at 18) to paragraph 6 of the Decree, which sets forth that both States are respectively enjoined from "disputing the sovereignty, jurisdiction, and dominion" of the other State over property that this Court held is owned by that State. *See* 295 U.S. at 698. New Jersey, however, does not claim that Delaware is disputing New Jersey's dominion over property *owned by New Jersey*. Instead, it claims that Delaware is infringing on New Jersey's rights over property *owned by Delaware*. Because those rights were not at issue in the prior case, they were not "adjudged to the state of New Jersey by th[e] decree." *Id.* An order with respect to New Jersey's asserted right to approve BP's project on land owned by Delaware without a veto by Delaware, therefore, would not be an order enforcing paragraph 6 of the 1935 Decree.

Second, New Jersey (at 18) points to statements in the Decree and this Court's 1934 Order that the resolution of the earlier boundary dispute was made "without prejudice to the rights of either state . . . by virtue of the compact of 1905 between said states." 295 U.S. at 699; *see* 291 U.S. at 385 (noting that Delaware's rights of ownership "[w]ithin the twelve-mile circle" are "subject to the Compact of 1905"). Contrary to New Jersey's claims, those statements did not create riparian rights that this Court could enforce through a later decree. Instead, this Court noted only that the riparian rights under the 1905 Compact -- whatever they were -- remained unaffected by the resolution of the boundary dispute. Determining the

scope of New Jersey's riparian rights, therefore, is not enforcing the 1935 Decree.[13]

For these reasons, New Jersey's motion does not fall within this Court's retained jurisdiction to enforce the 1935 Decree.

B. This Court Lacks Original Jurisdiction Over New Jersey's Motion, Even If Treated As A Motion For Leave To File A New Original Action

When New Jersey's motion is viewed as a request to initiate a new original action, it is clear that New Jersey has not satisfied its burden of demonstrating that a case or controversy exists between New Jersey and Delaware.

1. New Jersey cannot demonstrate any "injury" caused by Delaware

As this Court has repeatedly held, for a case to come within this Court's original jurisdiction, the "complaining State" must allege that it "has suffered a wrong through the action of the other State," *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939), and "must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State," *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (per curiam). In making that showing, "the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties." *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *see also Alabama v. Arizona*, 291 U.S. 286, 292 (1934) ("The burden upon the plaintiff state fully and clearly to establish all essential elements of its case is greater than that generally required to be borne

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[13] Nor is there reason for this Court "to confirm that the 1935 Decree protects New Jersey's rights under the Compact." NJ Br. 18. Delaware does not argue that the 1935 Decree altered or reduced New Jersey's rights under the Compact, except insofar as this Court's clarification of the proper boundary between the two States necessarily affected the States' rights as addressed in the 1905 Compact.

by one seeking an injunction in a suit between private parties.").

As an initial matter, New Jersey has not demonstrated that it has suffered any injury that was "directly caused" by Delaware. New Jersey cannot demonstrate injury from Delaware's denial of the DCZA permit for the Crown Landing project because *New Jersey itself* has yet to approve BP's application for approval under New Jersey's Coastal Zone Management Rules. *See supra* pp. 16-17. Instead, the New Jersey agency has twice found BP's application to be deficient, with the most recent notice of deficiency sent just two weeks before New Jersey filed the instant Motion. Under the federal CZMA, approval of BP's New Jersey application is a necessary prerequisite to FERC's approval of the Crown Landing project.

In addition, even aside from the Delaware and New Jersey coastal zone permits, FERC could well deny BP the necessary federal permit on other grounds. *See* 16 U.S.C. § 1456(c)(3)(A). As discussed above, FERC has not yet completed its review of the Crown Landing proposal and is still considering numerous comments -- including from the NJDEP -- in opposition to its Draft EIS. FERC also has not made determinations under the Clean Air Act that are necessary for the ultimate approval of the Crown Landing project. FERC, therefore, could refuse to authorize construction irrespective of Delaware's denial of a permit. The same is true of the Corps and the Coast Guard, both of which have yet to complete their reviews of the project. *See supra* pp. 17-20.

Until the administrative processes before the New Jersey and federal agencies are completed, it is completely speculative whether Delaware's action is the conclusive event in causing BP's permit application to be denied. Therefore, New Jersey has not suffered any injury at this time, let alone one directly caused by Delaware. *See, e.g., Alabama v. Arizona*, 291 U.S. at 292 (original jurisdiction will not be exercised unless the "threatened injury is

clearly shown to be of serious magnitude and imminent").[14]

In addition, as discussed above, the record compiled before FERC shows that there are five other locations in close proximity to the Crown Landing site on the New Jersey coastline, all of which are outside the twelve-mile circle, where BP could have chosen to build its proposed LNG terminal. *See supra* pp. 17-18. Because those locations would not involve the use of Delaware's lands, Delaware would not have authority to require BP to obtain the same types of permits under Delaware laws as are required for the Crown Landing site. BP's selection of the Crown Landing site was based on its commercial reasons, *see supra* pp. 9-10, not because of any sovereign interest of New Jersey. Those alternate locations would provide the same economic benefits to New Jersey that the State claims it is being denied due to Delaware's action, everything from jobs for its citizens to lost revenue for its school programs. *See* NJ Br. 21-22. But, because BP could construct the bulk product transfer facility at a location that would not implicate Delaware's sovereign interests, the only conceivable injury sustained by Delaware's action is to BP's economic interest in obtaining the Crown Landing site. The invocation of this Court's original jurisdiction, however, rests on the *State's* injury, and not that of a private party. *See, e.g., Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (per curiam); *Louisiana v. Texas*, 176 U.S. at 16; *infra* pp. 30-31.[15]

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[14] This is not a case like *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), in which the Court exercised original jurisdiction based on its finding that the threatened injury — from a West Virginia statute that placed a "direct and certain," "positive duty" on pipelines in West Virginia, on pain of "penal" sanctions, to satisfy in-state demand before selling to out-of-state consumers — was "certainly impending." *Id.* at 593. Here, in contrast, the DCZA permit that was denied is only one of a number of required approvals that BP has not yet obtained and may not obtain.

[15] The pendency of administrative actions in New Jersey and before the United States government that could cause the relocation of BP's

Given that Delaware's denial of permits required for the Crown Landing project does not foreclose the possibility that New Jersey could obtain the same benefits for its citizens if the LNG facility were located elsewhere, New Jersey cannot establish the injury requisite to an invocation of this Court's original jurisdiction. In any event, any dispute that might ultimately arise if New Jersey were somehow injured concretely clearly is not ripe now.

New Jersey's other claims of injury from Delaware's exercise of its authority within the twelve-mile circle with respect to projects other than Crown Landing are plainly insufficient to support the exercise of this Court's original jurisdiction.

Other than BP's request for a permit, New Jersey points to only two instances in which Delaware has required a permit under either the DCZA or the DSLA for projects built out from New Jersey's coastline and within the twelve-mile circle. As New Jersey concedes, Delaware *granted* those other permits. *See* Petition ¶¶ 23, 25 (Logan Generating was granted DCZA and DSLA permits); *id.* ¶ 25 (Fenwick Commons was granted a DSLA permit). Therefore, New Jersey suffered no cognizable injury with respect to those projects.

Left without any concrete injury, New Jersey falls back on the assertion that Delaware's insistence on exercising its rights within the twelve-mile circle "threaten[s] the construction of projects by the State of New Jersey itself." *Id.* ¶ 37. Tellingly, New Jersey does not identify a single such project, pending or contemplated. This Court has previously treated such allegations of "injury to the State as proprietor merely as a 'makeweight.'" *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 450 (1945); *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions [to visit locations to observe animal species] – without any description of concrete

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proposed LNG facility amplify the speculative nature of New Jersey's proffered injury at this time.

plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require").

Similarly, New Jersey asserts that Delaware's exercise of its permitting authority within the twelve-mile circle "may discourage economic development along this part of New Jersey's shoreline," which in turn may "diminish the income received by the State of New Jersey for conveyances and leases of riparian lands." Petition ¶¶ 36, 38. This Court has previously rejected invocations of its original jurisdiction based on such "purely speculative, and, at most, only remote and indirect" allegations of injury. *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

Thus, New Jersey seeks to use this Court's original jurisdiction "to consider abstract questions," such as "questions respecting the right of the plaintiff state . . . to use the waters . . . in the indefinite future." *New York v. Illinois*, 274 U.S. 488, 489-90 (1927). As this Court has held, it is "not at liberty" to grant such requests. *Id.* at 490; *see Massachusetts v. Missouri*, 308 U.S. at 17 ("Nor does the nature of the suit as one to obtain a declaratory judgment aid the complainant. To support jurisdiction to give such relief, there must still be a controversy in the constitutional sense and as between the two States there is no such controversy here.") (citation omitted). Indeed, in a comparable case, this Court agreed with New Jersey in a suit brought by New York. This Court held that New York had not yet suffered any injury and dismissed the suit "without prejudice to a renewal of the application for injunction if the operation of the sewer of [New Jersey] shall result in conditions which the state of New York may be advised requires the interposition of this court." *New York v. New Jersey*, 256 U.S. at 314.[16]

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[16] This is not a case like *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), where the Court permitted Wyoming to bring suit to challenge an Oklahoma statute designed to limit importations of Wyoming coal. There, even though "Wyoming does not itself sell coal, it does impose a severance tax upon the privilege of severing or extracting coal from

2. BP, not New Jersey, is the real party in interest

Wholly apart from New Jersey's lack of a concrete injury caused by Delaware, this Court also lacks original jurisdiction over New Jersey's motion for an independent reason: BP, not New Jersey, is the real party in interest. As this Court has held, "it is not enough that a State is plaintiff" to invoke this Court's original jurisdiction; rather, this Court "must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-93 (1938). Where a suit is brought "in the name of the State but in reality for the benefit of particular individuals" — and even where "the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy" -- this Court has refused "resort to [its] original jurisdiction." *Id.* at 394; *see Illinois v. Michigan*, 409 U.S. at 37 (finding that it lacked original jurisdiction where a State, "though nominally a party, is here 'in vindication of the grievances of particular individuals'"); *Massachusetts v. Missouri*, 308 U.S. at 17 ("Massachusetts may not invoke our jurisdiction for the benefit of such individuals."); *North Dakota v. Minnesota*, 263 U.S. at 375-76 (explaining that a State cannot invoke the Court's original jurisdiction "to present and enforce individual claims of its citizens as their trustee against a sister state"); *Louisiana v. Texas*, 176 U.S. at 16 (holding that "to maintain [original] jurisdiction . . . it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals").[17]

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land within its boundaries," and Oklahoma's statute had "directly affect[ed] Wyoming's ability to collect severance tax revenues," by depriving it of actual revenues. *Id.* at 442, 445, 451, 452 & n.10.

[17] Although this Court has exercised jurisdiction in cases where a State acts "as the representative of its citizens in original actions

Here, there can be no serious dispute that the real party in interest with respect to the construction of the Crown Landing facility is BP — which is not even a New Jersey citizen.[18] As shown above, it is for BP's commercial reasons, and not for New Jersey's government interests, that BP prefers the Crown Landing location to other possible locations on the New Jersey coastline that would not be subject to Delaware's permitting authority.[19]

Contrary to New Jersey's assertion (at 19-20), this case is not like *Virginia v. Maryland*, 540 U.S. 56 (2003). In that case, Virginia sued on behalf of a governmental entity, the Fairfax County Water Authority ("FCWA"), rather than a private corporation. *See id.* at 63-64. In addition, the FCWA sought a permit from Maryland to construct a water-intake structure to provide water specifically for the benefit of residents of Fairfax County, *see*

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where the injury alleged affects the general population of a State in a substantial way." *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981), that is not the case here, where New Jersey is acting for the specific benefit of a single corporation. *Cf. North Dakota v. Minnesota*, 263 U.S. at 375-76 (recognizing the "right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state").

[18] Neither BP nor Crown Landing, LLC is incorporated in New Jersey or has its principal place of business there. Crown Landing, LLC is a Delaware LLC formed on November 20, 2003, and its only member is BP America Production Company, a Delaware corporation that is a fifth-tier subsidiary of BP p.l.c., which is organized under the laws of England and Wales with its principal place of business in London, England. BP formed Crown Landing, LLC specifically to manage the LNG Terminal site. Crown Landing's principal place of business is 501 Westlake Park, Houston, Texas. Crown Landing, LLC does not have any customers, so the proposed LNG project does not have any impact on current customers' transportation rates or service. *See* BP September 16, 2004 FERC Application.

[19] It would be no answer for New Jersey to argue on reply that it has a sovereign interest in where BP's facility is situated, and that the assertion of interest is sufficient to create original jurisdiction in this Court. Such an interest surely must give way when reasonable alternatives exist to the encroachment on a neighboring State's lands.

id., and not for the benefit of a corporation's private shareholders. Virginia had no alternative sites along the river that were outside of Maryland's authority. Finally, Maryland took more than five years to reach a final decision on the FCWA's permit application, which it eventually granted subject to a condition — uniquely imposed on that one project — that severely reduced the utility of the water-intake structure and that was imposed pursuant to special legislation directed at this project. *See id.*

C. Even If This Court Has Original Jurisdiction Over New Jersey's Motion, It Should Decline To Exercise That Jurisdiction

Even in instances in which the Court has *both* original and exclusive jurisdiction, it may "exercise[] [its] discretion not to accept original actions." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *see also Louisiana v. Mississippi*, 488 U.S. 990 (1988) (declining to exercise its exclusive jurisdiction over a boundary dispute between two States). If this Court were to find that New Jersey's motion is within its original jurisdiction, the Court should exercise its discretion and decline to accept jurisdiction over that motion.

In "[d]etermining whether a case is 'appropriate' for [its] original jurisdiction," this Court considers two factors: "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim," and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks and citation omitted); *see, e.g., California v. Texas*, 457 U.S. 164, 168 (1982) (per curiam) (same). Parts I.A and I.B above establish that New Jersey's claims of injury based on the alleged infringement of its riparian rights are speculative and insubstantial, and that BP (and not New Jersey) is the real party in interest in this action.

In addition, an alternative forum existed for consideration of Delaware's authority to require a DCZA permit for the Crown Landing facility — namely, an appeal to state

court of the CZICB's decision to affirm the Secretary's denial of the DCZA permit. New Jersey relies on BP's claim that such an appeal would have been "futile," in light of Delaware Code Annotated title 7, § 7008, which normally limits review of a Board decision to "whether the Board abused its discretion in applying standards set forth by [Chapter 70] and regulations issued pursuant thereto to the facts of the particular case." *See* NJ App. 140a-141a (Segal Decl. ¶ 19).

But Delaware courts have made clear that the Superior Court, in an appeal from a decision under the DCZA, has jurisdiction to hear claims that the Board's decision "on the subject of the . . . permit was not a valid decision of the Board." *Shields v. Keystone Cogeneration Sys., Inc.*, 611 A.2d 502, 507 (Del. Super. Ct. 1991). In that case, a party challenged the grant of a DCZA permit on the ground that "there was no valid Board action in this matter," because the decision was made by the "vote of four members of the nine member Board," rather than the majority of a quorum. *Id.* at 505, 507. In holding that it had jurisdiction to hear such a claim, which goes beyond the specific matters listed in § 7008, the court explained that "the customary appeal standard could not be applied" where there was no valid decision of the Board. *Id.* at 505.

In this case, BP could have raised on appeal the contention New Jersey makes in this Court — that the Board (and the Secretary) had no legal basis to require a DCZA permit for the Crown Landing project because New Jersey's alleged riparian rights prevent the application of Delaware's DCZA to the Crown Landing project. Moreover, New Jersey itself could have appealed the Board's decision on that ground, even after BP chose not to do so.[20] Final judgments of the Superior Court can be di-

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[20] *See* Del. Code Ann. tit. 7, § 7008 ("[a]ny person aggrieved by a final order of the State Coastal Zone Industrial Control Board . . . may appeal the Board's decision to Superior Court").

rectly appealed to the Supreme Court of Delaware. *See* Del. Const. art. IV, § 11(1)(a). BP or New Jersey could then have sought this Court's review of the issue in the normal course, through a petition for a writ of certiorari.

This Court has previously refused, in a case alleging a violation of an interstate agreement with the "dignity of an interstate compact," to exercise its original jurisdiction to hear a dispute between two States where, as here, review could have been sought by a petition for a writ of certiorari, even though it was by then "too late for any such petition for certiorari to be filed." *Illinois v. Michigan*, 409 U.S. at 36-37. In that case, the Court explained that its "original jurisdiction . . . is not an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought." *Id.* at 37.[21]

Although New Jersey asserts (at 20) that "a Delaware venue clearly would not provide New Jersey an adequate forum" to raise the issue presented here, this Court has previously rejected such a claim. In *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), the Court held that a "pending state-court action [in New Mexico] provide[d] an appropriate forum in which the *issues* tendered here [by Arizona] may be litigated." *Id.* at 797; *see also id.* (explaining that, if Arizona did not prevail before the

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[21] New Jersey's reliance (Br. 20) on *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), is misplaced. In that case, Wyoming had alleged a direct injury to itself, as sovereign, and this Court found that "Wyoming's interests would not [have] be[en] directly represented" in a separate action that might have been brought by Wyoming companies more directly affected by the dispute. *Id.* at 442, 445, 451-53 & n.10. In those circumstances, this Court exercised its original jurisdiction over Wyoming's challenge to an Oklahoma statute, finding that "no pending action exists to which we could defer adjudication on this issue." *Id.* at 452. Here, by contrast, the Delaware courts would have permitted BP or New Jersey to raise on appeal the claim that the Delaware agency's conclusion that Crown Landing was subject to the DCZA was *ultra vires* or otherwise improper because of the 1905 Compact.

"New Mexico Supreme Court, . . . the issues raised now may be brought to this Court by way of direct appeal").

II. DELAWARE HAS THE AUTHORITY UNDER THE 1905 COMPACT TO REGULATE RIPARIAN STRUCTURES ERECTED ON DELAWARE'S SUBMERGED LANDS

If the Court reaches the merits of New Jersey's request at this time, it should reject New Jersey's motion to reopen or for supplemental decree.[22] At the time the 1905 Compact was drafted, there was widespread disagreement over the scope of "riparian" rights enjoyed by a landowner adjacent to navigable waters. Much depended on the legal context — whether a particular jurisdiction incorporated the English common law, changed that law by statute, or developed other principles through other sources of law. *See generally* 1 Henry P. Farnham, *The Law of Waters and Water Rights* 279 (1904) ("*Farnham's Law of Waters*"). As Farnham explained in his 1904 treatise, "[t]he courts do not fully agree in their enumeration of these [riparian] rights." *Id.* In general terms, "riparian" rights refer to the cluster of rights an owner of land adjacent to waterways had of "access" to the waterway; "preference in case the land under the water is to be sold"; "accretion and the preferential right to fill out into the water if such filling is permitted by the public"; and "free use of the water space immediately adjoining his property for the transaction of such business as may be necessary in connection with wharves or structures erected by him." *Id.* at 279-80. But, as Farnham cautions, "all of the courts have not recognized some of the rights above enumerated," *id.* at 280, and certain of those rights — such as the

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[22] Our submission here is that New Jersey's motion to invoke this Court's original jurisdiction should be denied because New Jersey's reading of the 1905 Compact is untenable. We reserve the right to file an Answer to New Jersey's petition and to address New Jersey's theories and evidence more fully in the event this Court grants New Jersey's motion and directs the parties to address the merits.

right to wharf out from the shore -- are "subject to several limitations," *id.* at 279.

Although at this preliminary stage in this proceeding it is not possible to define comprehensively all of the rights and duties — or the limitations thereon -- a New Jersey landowner with riparian rights would have with respect to Delaware lands within the twelve-mile circle, the Court at this time may reject New Jersey's principal submission: that New Jersey has "exclusive" jurisdiction to authorize a riparian landowner on New Jersey's shore to build a bulk transfer facility on Delaware's submerged lands.[23] No such right was recognized prior to 1905; the Compact did not change that result; New Jersey's arguments to the contrary are unpersuasive; and this Court's recent decision in *Virginia v. Maryland* does not support New Jersey's assertion.

A. Prior To The 1905 Compact, Delaware Unquestionably Had The Authority To Regulate Or To Exclude Altogether On Delaware Submerged Lands A Structure Such As BP's LNG Bulk Transfer Facility

1. As owner of the tidal lands in question, Delaware holds the lands in a public trust for the people

In numerous cases, this Court has recognized the bedrock principle that "[o]wnership of submerged lands -- which carries with it the power to control navigation, fishing, and other public uses of water — is an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997); *see also, e.g., Montana v. United States*, 450 U.S. 544, 551 (1981) ("[T]he ownership of land under

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[23] If the Court has any doubt on that score or believes that New Jersey's questions presented require a more comprehensive treatment of the meaning of "riparian jurisdiction" outside the specific confines of the dispute over BP's Crown Landing proposal, the appropriate disposition would be to appoint a Special Master so that the law of riparian rights, as reasonably understood by the parties and incorporated into the 1905 Compact, may be more fully explored.

navigable waters is an incident of sovereignty."). Those attributes of sovereignty necessarily extend to the limits of the sovereign's boundary, for, as this Court has long held, "when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838).

A state holds its lands in trust for the people, and that principle extends as well to submerged lands, which are treated with the same incidents of sovereignty as uplands. For that reason, a court considering the scope of an incursion on the "'title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *United States v. Alaska*, 521 U.S. at 34 (quoting *Montana v. United States*, 450 U.S. at 552) (ellipsis in original).

That presumption against any impairment to the title of a State's submerged lands derives from the fact that a State's "title to soils under tide water" "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).[24] To be sure, a State may convey property for the purpose of erecting a wharf to aid navigation, "consistent[] with the trust to the public upon which such lands are held by the State." *Id.* But "[t]he State can no more abdicate its trust over prop-

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[24] This rule had its origins in England, where, at "'common law, the title and dominion in lands flowed by tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.'" *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988) (ellipsis in original) (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)); *see also Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410-12 (1842).

erty in which the whole people are interested, like navigable waters and the soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

That incidence of public trust in submerged lands acts as a check against efforts by legislators and other government officials to relinquish the power and authority of a State over those lands. This Court found the public trust to be so strong in *Illinois Central*, for example, that it held the Illinois legislature's transfer to a railroad of title to a large part of the Chicago harbor in Lake Michigan to be "beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997) (citing *Illinois Central*, 146 U.S. at 455-60). While that holding "was necessarily a statement of Illinois law, it invoked the principle in American law recognizing the weighty public interests in submerged lands." *Id.* (internal quotation marks and citation omitted). Indeed, New Jersey courts have interpreted *Illinois Central* to stand for the principle that, "[a]lthough the states have the inherent authority to convey riparian grants to private persons, the sovereign never waives its right to regulate the use of public trust property." *Karam v. New Jersey Dep't of Envtl. Protection*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (citation omitted), *aff'd*, 723 A.2d 943 (N.J. 1999). Delaware could conceivably convey its submerged lands for use by private persons, but it would still retain its regulatory authority over those lands as part of its public trust responsibility.

That public trust principle does not, however, ordinarily extend beyond the boundaries of the State's territory, even when the boundary is determined by a body of water. As Farnham explains, "[i]n the absence of an agreement or understanding between the opposite states, the jurisdiction of each is limited to its own side of the stream, and does not extend beyond its boundary." 1 *Farnham's Law*

of Waters at 31; *see also id.* at 39 ("Whatever acts involve title to the soil are exclusively under the jurisdiction of the owner of the soil. . . . [But a state] cannot pass a law to govern another state, or realty situated therein."); *see also Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899) ("Whatever jurisdiction the State of Indiana may properly exercise over the Ohio River, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that State and permanently within the limits of Kentucky.").[25]

As the understanding of a sovereign's ownership of submerged lands evolved, the courts came to recognize two distinct aspects of this sovereignty — the right of ownership and the right of conservation:

> The right of the crown in navigable waters is twofold, the right of property, and the right of conservation; and these rights are perfectly distinct, and may be transferred and separated. The right of conservation of a river may be given to the corporation of a city as far as the tide flows, but they are not thus made owners of the soil or bed of such river. And the ownership of soil, and the license of conservation, are not sufficient to legalize an erection in tide river; for the question of nuisance or not, may still be raised.

Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 202-03 (1847).

In the late nineteenth century, therefore, a court addressing the issue raised here would have concluded that

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[25] While not at issue in this case, a state's sovereign power over navigable waters is subject "to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government." *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

Delaware holds its submerged lands in trust for the people of the State, that one of the incidents of sovereignty is "the right of conservation," and that Delaware could not lightly be held to have relinquished its trust lands to another sovereign or a private party. For those reasons, the action taken by Delaware here – to deny a permit to BP to construct a massive bulk product transfer facility requiring the dredging of 800,000 cubic yards of soil over 27 acres of submerged lands – was perfectly consistent with its responsibility to hold those lands in trust for the people of Delaware.

2. Even without a public trust relationship, Delaware has police authority to regulate uses of its submerged lands

In addition to the established law that submerged lands owned by the sovereign are held in a public trust, riparian rights have always been deemed to be "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871). That restriction is especially true of the right to wharf out, on which New Jersey relies.

The law appears never to have recognized an absolute right on the part of a riparian landowner to conduct whatever activities it wants simply because they occur on a wharf. Justice Holmes explained in 1908 that "it is recognized" that States may "by statute" pass laws "to protect the atmosphere, the water and the forests within its territory," based on a "principle of public interest and the police power." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355-56 (1908). Thus, "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). That same expansive police power necessarily operates to per-

mit a State to impose reasonable restrictions on the exercise of riparian rights.

Had the 1905 Compact never been executed, there could be no question that Delaware would have sovereign authority all the way to the boundary between the two States, which this Court held in 1934 extends to the low-water mark on the New Jersey shore within the twelve-mile circle. As a leading water rights treatise of the day explained, "[i]f one state owns the whole river, it may enact and enforce laws as far as the opposite shore, since the whole river is within its territorial jurisdiction." 1 *Farnham's Law of Waters* at 38-39. The territorial jurisdiction supports the exercise of police power, and that jurisdiction and power extend to the State's boundary.

3. Under New Jersey law, the owner of riparian lands could not build structures on navigable waters on submerged lands the landowner did not own

Even if there were any doubt about the foregoing principles and how they would support a decision by Delaware not to permit its submerged lands to be used for a massive bulk product transfer facility, BP would have had no right to build its structures on those submerged lands under New Jersey law. In the nineteenth century, courts varied as to whether they recognized the right of owners of riparian lands to build on adjoining submerged lands that they did not own. In some States, for example, riparian rights "rest[ed] on title to the bank, and not upon title to the soil under the water." *Northern Pine-Land Co. v. Bigelow*, 54 N.W. 496, 498 (Wis. 1893) (internal quotation marks omitted); *see also, e.g., In re West 205th Street in City of New York*, 147 N.E. 361, 362 (N.Y. 1925) ("Riparian rights . . . are not dependent upon ownership of the shore, and are the same, whether or not the riparian owner owns the soil under water."). In Florida, however, the statutory rule was that a riparian landowner had to own property down to the ordinary low-water mark in order to be a

"riparian proprietor" for certain purposes. *Axline v. Shaw*, 17 So. 411, 414 (Fla. 1895).

In New Jersey, by contrast, a landowner has been required to acquire from the government a protectible property interest in the submerged land on which a structure is built to be able to enjoy that aspect of riparian rights. *See, e.g., Beck's Waters and Water Rights* § 7.02(a)(1) (collecting cases); NJ App. 27a (Castagna Aff. ¶ 4) ("Riparian owners have a preemptive right to apply to the State of New Jersey to lease or purchase the State's tidal land in front of their upland. N.J. Stat. Ann. § 12:3-7 (enacted in 1869.) A sale or lease to one who is not an upland owner must be with the consent of the upland owner or on six month's notice to the upland owner. N.J. Stat. Ann. § 12:3-9 (enacted 1869.) Otherwise, the grant or lease will be void. *Shamberg v. Board of Riparian Commissioners*, 43 N.J.L. 132, 60 A. 43 (Sup. Ct. 1905.)."). Thus, had this issue arisen prior to execution of the 1905 Compact, BP would not have had a right under New Jersey law to build its facility beyond the limit of its own territorial ownership -- and certainly not 2,000 feet beyond that boundary into Delaware's sovereign-owned subaqueous lands -- unless the landowner (Delaware) gave its permission.

4. Nothing in pre-1905 riparian rights law would have led the States to think that Delaware lacked authority to regulate a massive 2,000-foot-long structure extending onto its sovereign lands

Even under New Jersey common law, a riparian landowner did not enjoy an exclusive right to build on a sovereign's submerged lands without being subject to any regulatory authority. *See, e.g., Bailey v. Driscoll*, 112 A.2d 3, 13 (N.J. Super. Ct. App. Div.), *aff'd in part and rev'd in part on other grounds*, 117 A.2d 265 (N.J. 1955). In *Bailey*, the court held that, "by the common law, the ownership of all lands under tidewater below high water mark within the territorial limits of the State belonged to the

Crown of England, did not pass to the proprietors of New Jersey under the grant from the Duke of York, and became vested by the Revolution in the sovereignty of the State under the guardianship of the Legislature." *Id.* As this Court likewise observed, "'[i]n the examination of the effect to be given to the riparian laws of the State of New Jersey,' . . . 'it is to be borne in mind that the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, property of the State as sovereign.'" *Shively v. Bowlby*, 152 U.S. at 21-22 (quoting *Hoboken v. Pennsylvania R.R. Co.*, 124 U.S. 656, 688 (1888)). Thus, "all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature." *Id.* at 22 (internal quotation marks omitted).

The *Bailey* court further recognized New Jersey's law as holding that each State is free "to determine over what submerged lands its sovereign prerogative of ownership shall be exercised (56 Am.Jur. § 461) and that each state may similarly deal with such lands 'according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public * * *.' 56 Am.Jur. § 471, p. 884." 112 A.2d at 13.

Two limitations on wharfage were routinely recognized in nineteenth century cases: the common law of nuisance and the State's police power to decide if the wharf was in the public interest. The first limitation provided that "every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance." *Newark Plank Road & Ferry Co. v. Elmer*, 9 N.J. Eq. 754, 1855 WL 122,

at *20 (N.J. 1855); *see also Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at *8 (N.J. 1870) ("That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied."); *Dutton v. Strong*, 66 U.S. (1 Black) 23, 30 (1861) (adjudicating claim "that the bridge pier was a nuisance, because . . . it was an obstruction to the public right of navigation"). The second limitation recognized the sovereign's ability to impose restrictions on the building of wharves and other structures. *See, e.g., Bailey*, 112 A.2d at 13. That was New Jersey's own public policy from the mid-nineteenth century onward, when it began through statutory law the process of limiting what wharves and other riparian structures a landowner could erect. *See* 1851 N.J. Laws 335 (Wharf Act); N.J. Stat. Ann. §§ 12:3-1 to 12:3-25 (1979) (cited sections originally enacted prior to 1905); NJ Br. 8.

It is axiomatic that, if New Jersey could exercise *its* sovereign prerogatives over the tidal shorelands from the boundary of the Crown Landing project to the Delaware border, Delaware too could exercise its sovereignty over those aspects of the industrial facility that BP seeks to place on Delaware's submerged lands. As the New Jersey courts have recognized, "a riparian owner has no rights at common law, except alluvion and dereliction,[26] in such waters or the lands under them, beyond those of the public generally, even including unimpaired access thereto, merely by reason of his ownership of the ripa." *Bailey*, 112 A.2d at 13 (citing *Bouquet v. Hackensack Water Co.*, 101 A. 379 (N.J. 1917)). Rather, by local common law, a riparian owner could "appropriate such lands between the high and low water marks in front of his property as his own by wharfing out and filling in," but in doing so "[s]uch local custom was nothing more than a license, which,

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[26] "Alluvion" and "dereliction" refer to the gaining and losing of land as a result of the natural processes of tides, river flow, and sea movements. A riparian landowner would have certain rights to protect the land against such additions and subtractions.

when executed, became irrevocable." *Id.* Therefore, the State as owner of the submerged lands "could do what it pleased with its lands under tidewater as far as the adjoining riparian owner was concerned unless the latter had already exercised his privilege of wharfing or reclamation." *Id.* Because BP has not already erected its structure, it has no license to assert against either State.

Under the principles recognized in its own courts in the nineteenth century prior to enactment of the 1905 Compact, therefore, New Jersey plainly would have no claim that it has exclusive jurisdiction, to the exclusion of Delaware, to regulate any structures or activities on wharves that originate on the New Jersey shore but extend onto Delaware lands. Accordingly, the only question here is whether the 1905 Compact changed that baseline rule of sovereignty such that Delaware was ousted of jurisdiction to regulate hazardous activities occurring on those wharves in Delaware waters.

B. The 1905 Compact Did Not Alter Delaware's Authority To Regulate Structures Built On Its Subaqueous Lands

A congressionally sanctioned interstate compact is a federal law subject to federal construction. "Just as if a court were addressing a federal statute, then, the first and last order of business of a court addressing an approved interstate compact is interpreting the compact." *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (internal quotation marks omitted). "[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded." *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823). The Court will explore "textual reasons" for compact terms and examine the structure and the entirety of an agreement to evaluate the reasonableness of an interpretation of one portion. *Cuyler v. Adams*, 449 U.S. 433, 446-47 (1981).

Only if the text of the compact is ambiguous will the Court consider extrinsic evidence, including the course of

negotiations, course of performance, or other post-execution history. *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991) ("[A] congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. . . . Thus, resort to extrinsic evidence of the compact negotiations in this case is entirely appropriate."); *see also O'Connor v. United States*, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning.").

In evaluating a question of competing claims between sovereigns, moreover, the rule is that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (holding that grant of title by federal government of subaqueous lands to Indian tribe withheld federal government's navigational easement).[27] New Jersey has likewise required "conclusive proof" of any purported relinquishment of property rights in lands owned by the State. *Stevens*, 1870 WL 5140, at *10 ("The claim is, that the legislature

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[27] *See also Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837) ("[W]henever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."); *id.* (Baldwin, J., concurring) ("[t]he rule that public grants pass nothing by implications, has been most rigidly enforced as to all grants of toll for ferries, bridges, wharves, quays, on navigable rivers and arms of the sea"), *reprinted in* WESTLAW, beginning at page 113 of the computer version of the Court's opinion, with the following notation: "**West Editorial Note:** the source of the following opinion is Baldwin's Constitutional Views, p. 134-169" (Justice Baldwin's concurring opinion apparently was not printed in the Peters Reports of this Court's decision in *Proprietors of Charles River Bridge* or subsequently in the U.S. Reports); *Harris v. Elliott*, 35 U.S. (10 Pet.) 25, 54 (1836) (giving a "strict, legal, technical interpretation" to purchase of land by United States for a navy yard in Charlestown, with the assent of Massachusetts).

has granted to these defendants the use of a part of the public domain. The state is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention to do so.").

Furthermore, it is common ground that the 1905 Compact was negotiated in the shadow of the then-unresolved boundary dispute. *See* NJ Br. 6 ("[t]he Compact did not establish the boundary line"). An interstate compact reached in the context of an unresolved boundary dispute must be "read . . . in light of the ongoing dispute over sovereignty." *Virginia v. Maryland*, 540 U.S. at 69. The drafters of the 1905 Compact would have understood that, absent some different provision, a subsequent adjudication of the boundary dispute would necessarily settle the boundary to which each State could exercise its "riparian jurisdiction."[28] Thus, the Court should construe the plain language of the Compact in that light.

1. Use of "continue" indicates that the States intended to maintain the status quo

The dispute before the Court turns primarily on the proper interpretation of Articles VII and VIII of the 1905 Compact. Article VII provides:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

NJ App. 5a. Article VIII then makes clear that nothing more than "riparian jurisdiction" was given in Article VII:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of

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[28] "Riparian jurisdiction" appears not to be a term of art with an understood meaning at common law or as defined in state statutes.

> the subaqueous soil thereof, except as herein expressly set forth.

Id.

By its plain terms, Article VII provides in pertinent part that "[e]ach State may, on its own side of the river, *continue* to exercise riparian jurisdiction of every kind and nature." *Id.* (emphasis added). "Continue" means "to remain in a given place or condition." *Webster's International Dictionary* 314 (1898). By use of this verb, therefore, the parties clearly intended to carry on exercising the same principles with respect to riparian rights as they had before.

New Jersey draws a different conclusion from this plain meaning, however. New Jersey finds "critical importance" in Article VII's use of the word "continue," claiming that "it shows that the States intended that their riparian *sovereignty* could carry on in the same manner as had been exercised in the past." Br. 25 (emphasis added). In conjunction with that legal assertion, New Jersey adds the alleged fact that prior to 1905 it had on eight occasions authorized riparian structures extending beyond the low-water mark. *See* Br. 25-26 (citing NJ App. 29a-36a (Castagna Aff. ¶ 8)).

That "course-of-dealing" evidence, however, does not advance New Jersey's argument in light of that State's acknowledgment that the Compact was drafted against the backdrop of an ongoing boundary dispute. Whatever course of dealing had occurred before became irrelevant under the Compact's express provision that, going forward, the States agreed that they would exercise jurisdiction only on their "own side of the [illegible]r." NJ App. 5a. As the drafters of the Compact well knew, the boundary between the States had long been in dispute. In fact, when this Court eventually adjudicated the boundary dispute in 1934, it rejected a similar argument by which New Jersey claimed title to the middle of the river by virtue of the very same riparian improvements on which it relies here, claiming that Delaware had acquiesced in those im-

provements. The Court concluded, however, that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them," and held that "[a]cquiescence is not compatible with a century of conflict." *New Jersey v. Delaware*, 291 U.S. at 376-77.

Article VII of the Compact simply provides that each State may "continue" to exercise riparian jurisdiction "on its own side of the river." It does not say that either State can do so beyond that boundary line, wherever it might later be adjudicated to lie. Thus, even if prior to 1905 New Jersey might have regulated riparian improvements on certain sites appurtenant to its shores that proved to be beyond the boundary adjudicated by this Court nearly 30 years later, the Compact in no way confers jurisdiction on New Jersey to regulate exclusively any *new* riparian structures extending from New Jersey's "own side of the river" into Delaware territory. New Jersey's apparently contrary construction of "continue" conflicts with the plain meaning of the word and the intent of the parties in deferring resolution of the precise boundary line.

Indeed, then as now, New Jersey's riparian laws expressly limited such transfers of rights to "lands of the state" — not lands of an adjacent State. N.J. Stat. Ann. §§ 12:3-9 (enacted 1877), 12:3-18 (enacted 1877), 12:3-21 (enacted 1891), 12:3-22 (enacted 1891), 12:3-23 (enacted 1891), 12:3-24 (enacted 1891), 12:3-25 (enacted 1891). Thus, New Jersey plainly could not "continue" to exercise the rights of a landowner with respect to land it has never owned. And no language in Article VII supports an argument that Delaware gave up its sovereign right to grant, lease, or convey its own titled lands.

2. Use of "on its own side" indicates that the States intended to preserve existing rights pending the outcome of the boundary dispute

Delaware's position that the 1905 Compact did not result in a transfer of sovereign rights to New Jersey is for-

tified by the Compact's reference to each party's exercise of jurisdiction on its "own side of the river." NJ App. 5a. By deferring resolution of the precise boundary coordinates, the States adopted non-specific language in Article VII — "own side of the river" — as a means of ensuring that, whenever the boundary dispute ultimately was resolved, the two States would know their respective rights and powers on their own side of the boundary. In 1905, the parties knew that "almost from the beginning of statehood Delaware and New Jersey ha[d] been engaged in a dispute as to the boundary between them," *New Jersey v. Delaware*, 291 U.S. at 376, so it would be illogical to read Article VII as giving up Delaware's right to assert its jurisdiction, including riparian jurisdiction, over land within its borders, wherever the boundary may ultimately be defined.

This Court's ruling in *Virginia v. Maryland* is instructive here. Virginia and Maryland had entered into a 1785 Compact at a time when the boundary between those States was in dispute and would not be resolved until 1877, when a binding arbitration award set the boundary at the low-water mark on the Virginia shore of the Potomac River. *See* 540 U.S. at 60-62; *id.* at 62 ("Although the 1785 Compact resolved many important navigational and jurisdictional issues, it did not determine the boundary line between the States, an issue that was left open to long continued disputes.") (internal quotation marks and ellipsis omitted). The 1785 Compact provided that "'[t]he citizens of each state respectively shall have full property in the shores of the Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.'" *Id.* at 66 (quoting Article Seventh of the 1785 Compact). Examining the various provisions of that compact, the Court observed that the provision in Article Seventh of a "privilege of making" wharves by the "citizens of each state" "was not explicitly

subjected to any sovereign regulatory authority," while the fishing right in Article Eighth "was subjected to mutually agreed-upon regulation." *Id.* at 66-67. The Court found "that these differing approaches to rights" "indicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of another." *Id.* at 67.

By limiting each State's jurisdiction to its "own side of the river," the drafters of the Compact did not authorize one State, such as New Jersey, to determine how the other State's submerged lands would be utilized. Sovereign jurisdiction stopped at the boundary line and went no further.

Buttressing this point is the fact that the drafters of the Compact resolved their fishing dispute by reference to specific geographic lines that would not change regardless of how the boundary dispute might someday be resolved:

> Art. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river *between low-water marks* on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

NJ App. 3a-4a (emphasis added). The specific geography denoted by the phrase "between low-water marks" is in stark contrast to Article VII's non-specific geographic phrase "own side of the river." The parties thus knew how to take a dispute over the right to use the Delaware River out of the shadow of the underlying boundary dispute, yet they plainly did not do so in Article VII.

Articles I and II, which likewise specify precise geographic lines, further show that Article VII was dependent on the future resolution of the then-unresolved boundary dispute. First, similar to Article III, Articles I and II permit each State to serve criminal and civil proc-

ess "from low-water mark on the New Jersey shore to low-water mark on the Delaware shore." NJ App. 2a-3a (Article I); *see also id.* at 3a (Article II). As with Article III, those precise geographic lines would apply regardless of the later resolution of the boundary dispute.

Second, Article I limits New Jersey's service of criminal process to offenses committed, among other things, "upon the *eastern half* of said Delaware River"; Article II correspondingly limits the criminal process that may be served by Delaware to offenses committed "upon the *western half* of said Delaware River." *Id.* at 2a-3a (emphases added). New Jersey's interpretation of Article VII would functionally rewrite the Compact by borrowing from other articles the specific language that it needs to give New Jersey "exclusive jurisdiction" (*id.* at 5a (Article IV)) "upon the eastern half of said Delaware River" (*id.* at 2a (Article I)). But Article VII does not contain that language. All it says is that each State has certain riparian rights "on its own side of the river." In view of the care with which the drafters expressly specified both exclusive jurisdiction and precise geographic boundary lines in other articles of the concise Compact (the substance of which spans less than four pages), it simply *cannot* be the case that Article VII grants New Jersey "exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline." NJ Br. 22.

Indeed, Article VIII of the Compact provides that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein *expressly* set forth." NJ App. 5a (emphasis added). Delaware's right to exercise its authority over structures on those lands can in no way be said to be "expressly" precluded by Article VII. The New Jersey Attorney General in 1954 recognized that basic point. In a Formal Opinion, he concluded that Article VIII leaves New Jersey powerless "to issue licenses for dredging within the twelve-mile Circle," which the Attorney Gen-

eral noted "New Jersey has never undertaken to issue." DE App. 72a (Formal Opinion 1954, No. 3, at 8 ("1954 Formal Opinion")). Moreover, he pointed out, "R. S. 1[2]:3-22 provides only for licenses to dredge or remove any deposits of sand or other material 'from lands of the state' under tide waters. The lands below low water mark within the twelve-mile Circle are not lands of this State, but lands of the State of Delaware." *Id.*[29]

The dredging proposed by BP here, moreover, is no small or incidental matter. It is inconceivable that Delaware would have ceded the authority to regulate the use and dredging of its subaqueous soil 2,000 feet out into Delaware waters in an area spanning 27 acres and requiring removal of the equivalent of 67,000 to 80,000 dump trunks worth of soil.

3. Nothing in the 1905 Compact diminished Delaware's pre-existing authority over its subaqueous lands

The 1905 Compact does not contain any provision evincing the requisite intent to cede Delaware subaqueous lands to New Jersey or otherwise to impair Delaware's public trust responsibility to manage those lands for the public good. Those omissions are fatal to New Jersey's argument, because a strong presumption exists that even a grant of submerged lands does not terminate the public trust. *See, e.g., Illinois Central*, 146 U.S. at 453; *see also Coeur d'Alene Tribe*, 521 U.S. at 284 (noting the "strong presumption" that state ownership of navigable waters "uniquely implicate[s] sovereign interests"); *supra* p. 37.

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[29] The opinion also concluded that "New Jersey has by virtue of Article VII the complete and exclusive right to make grants and leases of riparian lands below low water mark on its side of the river." DE App. 70a (1954 Formal Opinion at 7). That conclusion is incorrect for all the reasons stated in this brief, and is in serious if not irreconcilable tension with the Attorney General's conclusion that New Jersey could not authorize dredging on Delaware's subaqueous lands because they are not "lands of the state" of New Jersey. *Id.* at 72a-73a (1954 Formal Opinion at 8).

New Jersey itself acknowledges, moreover, that its exercise of "riparian jurisdiction" to regulate riparian rights is separate and apart from the State's jurisdiction to regulate based on environmental or conservation concerns. As one of its affiants explains, "[r]iparian owners, once they have a grant or lease, may dredge out from the area of their grant in order to reach the navigable channel. N.J. Stat. Ann. § 12:3-21 (enacted 1891.) *The exercise of this right is subject to obtaining applicable State environmental permits and a tidelands license.*" NJ App. 28a (Castagna Aff. ¶ 4) (emphasis added).[30] Indeed, one of the riparian grants to build a wharf on which New Jersey relies (at 26) states that "nothing in this act shall affect the rights of the State to lands lying under water," 1871 N.J. Laws ch. 307, § 1, thus making clear that a riparian grant does not obviate the exercise of other forms of jurisdiction.

Accordingly, New Jersey's grant of the right to use lands pursuant to its riparian jurisdiction would not prevent that State from exercising other forms of jurisdiction under other bodies of law to regulate conservation and the environment. Thus, even if New Jersey were correct that Article VII gave it "exclusive riparian jurisdiction" to decide the placement of wharves extending from the New Jersey shore into Delaware waters, NJ Br. 1, that term cannot be read so expansively as to preclude Delaware from exercising jurisdiction under its coastal zone laws, just as New Jersey's issuance of a riparian grant does not preclude it from enforcing its other generally applicable laws within that State.

In this case, Delaware strives to protect its fragile coastal zone. The purpose of the Delaware Coastal Zone Act is "to control the location, extent and type of industrial development in Delaware's coastal areas," because

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[30] The cited New Jersey statute was in place at the time the 1905 Compact was executed, and was codified under the heading of "Riparian Rights." *See* DE App. 167a (4 N.J. Comp. St., Riparian Rights § 36 (1911)).

those "coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State." Del. Code Ann. tit. 7, § 7001. In doing so, "the State can better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." *Id.* The Delaware legislature "further determined that offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." *Id.* Thus, the Delaware Coastal Zone Act provides that "offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited in the coastal zone, and no permit may be issued therefor." *Id.* § 7003. The purpose of the Act is to regulate the environment, not regulate riparian rights, and even its provisions restricting bulk product transfer facilities do not apply solely to riparian owners. *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406-07 (3d Cir. 1987) (holding that the DCZA as applied to vessel-to-vessel transfers does not offend the dormant Commerce Clause); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246-47 (Del. 1985) (holding that vessel-to-vessel transfers fell within the definition of "bulk product transfer facilities" to advance the purposes of the DCZA).

Nothing in the phrase "riparian jurisdiction" can be read to preclude Delaware from exercising jurisdiction over its coastal zone environment. Indeed, the text of the Compact itself makes clear that the term "riparian jurisdiction" does not encompass the regulation of all activities that occur on or are attached to a wharf. In Articles I and II, the Compact sets out the rules for service of process and provides that neither State may serve process on a vessel that is "fastened to a wharf adjoining" the other State. NJ App. 3a. Plainly, if "riparian jurisdiction" encompassed the regulation of all activities that happen to

take place on or in connection with a wharf, this language would be surplusage. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2002) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted). Such a reading is especially to be avoided here, where the applicable interpretive rules counsel that language claimed to accomplish the relinquishment of any element of sovereignty or a State's public trust duties must be construed narrowly.

C. New Jersey's Arguments For "Exclusive" Riparian Jurisdiction Are Unpersuasive

1. The States intentionally did not confer "exclusive" authority with respect to riparian rights

Notwithstanding New Jersey's frequent assertion that the 1905 Compact conferred "exclusive State riparian jurisdiction" -- including in the Question Presented (Br. i) -- the word "exclusive" does not appear at all in Article VII's treatment of riparian rights. That omission is noteworthy, because elsewhere in the Compact the drafters *did* use the word "exclusive," and they did so when they wanted to confer such authority on the States.

Article III, for example, gives the inhabitants of Delaware and New Jersey "a common right of fishery." NJ App. 3a. Article IV then provides for the future drafting of concurrent state fishing laws, and holds that "[e]ach State shall have and exercise *exclusive jurisdiction* within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for." *Id.* at 5a (emphasis added). If, as New Jersey claims, the drafters intended in Article VII to give New Jersey "exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline" (Br. 22), then it is hard to understand why the drafters did not simply use the phrase "exclusive jurisdiction," as they did in Article IV. Construing the Compact as a fed-

eral statute, the governing principle is that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also Norfolk & N.B. Hosiery Co. v. Arnold*, 45 A. 608, 609 (N.J. 1900) ("The express reservation of an election in the latter clause excludes the inference of such reservation in the former. If an option was to obtain in both instances, the parties knew how to express it, and would have used language appropriate to secure it.").

The omission of "exclusive" in Article VII of the 1905 Compact is all the more striking because New Jersey had prior drafting experience with an interstate compact that gave it such rights with respect to certain riparian appurtenances. In the 1834 Compact between New Jersey and New York, the parties provided with respect to the Hudson River that "[t]he state of New York shall have and enjoy *exclusive* jurisdiction of and over all the waters . . . of [the] Hudson River . . . to the low water-mark on the westerly or New Jersey side thereof," "subject to" a proviso that "[t]he state of New Jersey shall have the *exclusive* jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York." Act of June 28, 1834, ch. 126, 4 Stat. 708, 709-10 (Article Third) (emphasis added). In that compact — with which the drafters of the 1905 Compact surely were familiar[31] — New Jersey took care to establish its "exclusive

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[31] Articles I and II of the 1905 Compact at issue here, which concern service of process, are largely identical to Articles Sixth and Seventh of the 1834 Compact between New Jersey and New York.

jurisdiction" over wharves, while the 1905 Compact with Delaware speaks only of "riparian jurisdiction" without any mention of one State's exclusive authority at the expense of the other. Thus, nowhere in the Compact does Delaware convey to New Jersey "exclusive" riparian jurisdiction over structures on Delaware soil.

2. The meaning of "riparian jurisdiction" cannot extend beyond the State's boundary

New Jersey claims that the Article VII phrase "'riparian jurisdiction' connotes State sovereignty over riparian improvements." Br. 24. The State seems to be arguing that, if a riparian owner builds a structure that begins on the New Jersey side of the boundary and extends past it into the Delaware side, New Jersey has "riparian jurisdiction" to decide the placement of wharves extending from the New Jersey shore into Delaware waters. There are numerous flaws in that position. First, it reads the words "on its own side of the river" out of Article VII. If a State could exercise "riparian jurisdiction" as to structures no matter where they lay, so long as they extend from its shore, there would be no point in adding the exclusionary language "on its own side of the river" to Article VII. Second, New Jersey acknowledges that it "is not disputing the location of the boundary between the States, which this Court decided in 1934." NJ Br. 1. That concession is a tacit acknowledgment that the phrase "riparian jurisdiction" is not used in Article VII as a reference to a geographical place, but rather that "jurisdiction" denotes a reference to legal authority, *i.e.*, as a means of expressing New Jersey's authority to continue to act with respect to a specific, limited body of law known as riparian rights in whatever place the Compact permits.[32]

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[32] Nor is there merit to New Jersey's claim that Article VII would be meaningless if it did not give New Jersey riparian jurisdiction rights beyond the low-water mark. *See* NJ App. 29a (Castagna Aff. ¶ 6). That was fundamentally the position of the New Jersey Attorney General in a formal opinion on which the State here, curiously, does not rely. *See* DE App. 70a (1954 Formal Opinion at 7). Because the

New Jersey next argues that, because "a primary objective of riparian improvements is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters," it follows that Delaware gave New Jersey the right to bar Delaware from exercising any sovereign rights within the twelve-mile circle if such exercise would in any way impact or "interfere with" any structure over which New Jersey seeks to exercise riparian jurisdiction. NJ Br. 24-25. As New Jersey necessarily concedes, however, the land under the river up *to the low-water mark on the New Jersey shore* belongs to Delaware. Both States have long recognized their sovereign right, acting in the public trust, to regulate such riparian improvements, including wharves, piers, and bulkheads. *See, e.g., Yates*, 77 U.S. (10 Wall.) at 504 (riparian proprietor has a "right to make a landing, wharf or pier . . . subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be"); NJ Br. 24-25 (citing Delaware and New Jersey cases). The question here therefore concerns which State (either or both) has *the right to regulate* such riparian improvements appurtenant to the New Jersey shore but extending into Delaware territory, and whether their jurisdiction to do so is exclusive or concurrent. Thus, the simple fact that riparian landowners (*i.e.*, those owning land abutting the shore) have long enjoyed a right to wharf out to navi-

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boundary had long been in dispute, the parties knew it might later be adjudicated to be at the low-water mark on the New Jersey shore (Delaware's position) or in the middle of the navigable channel (New Jersey's position). It thus made sense for the parties to make clear that they could "continue" what they had been doing with respect to riparian jurisdiction on each State's "own side of the river," wherever that boundary might subsequently be held to lie. Indeed, if the parties *really* had meant for New Jersey to have riparian jurisdiction *beyond* the low-water mark, then they surely would have said that, just as they delineated other rights in the Compact based on the low-water mark or another specific geographic designation, such as the western and eastern halves of the river. *See* NJ App. 2a-3a (Articles I, II).

gable waters subject to regulation by a state sovereign does not resolve the question *of which* state sovereign has that right in waters and subaqueous soil that indisputably belong to Delaware.

New Jersey likewise erroneously relies (at 25) on the *Article VII* phrase that each State's riparian jurisdiction is "of every kind and nature." NJ App. 5a. That is only so on New Jersey's "own side of the river," and the phrase "of every kind and nature" does not speak to where New Jersey's "own side of the river" might lie. To say that a State has full jurisdiction within its territory simply does not address whether it has any jurisdiction *outside* its territory. Moreover, "of every kind and nature" does not purport to extinguish pre-existing limitations on riparian rights, such as the inherent limit of a sovereign to regulate wharves or New Jersey's limitation prohibiting a riparian landowner from building structures on lands unless the landowner owned the subaqueous lands on which the structure was to be built.

3. New Jersey's invocation of other miscellaneous Compact provisions is unpersuasive

New Jersey next claims that Articles I and II reinforce its reading of the Compact because they "limit the States from asserting jurisdiction over wharves or docks attached to the other State by prohibiting the service of process by one State aboard a vessel attached to a pier or wharf on the banks of the other." Br. 26. New Jersey reads those Articles to "underscore[] the intent of the drafters to ensure that wharves and piers were subject solely to the jurisdiction of the State to whose riverbank they were attached." Br. 26-27. Articles I and II, however, concern service of process on persons found on a ship attached to a wharf, and not riparian rights to regulate the use of the wharf itself.

Indeed, the fact that the drafters were specific about certain rights on ships "fastened to a wharf adjoining" New Jersey (NJ App. 3a) shows that they knew how to be specific about wharves in the Compact — but in Article

VII they did not ground the respective States' riparian jurisdiction on a "wharf adjoining" New Jersey; instead, they limited jurisdiction to the States' "own side of the river." *Cf. Virginia v. Maryland*, 540 U.S. at 66 (compact expressly gave Virginia citizens "the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river").

4. New Jersey's argument that the States' "contemporaneous construction" of the Compact supports its exclusive jurisdiction has no merit

New Jersey's argument (at 30-33) that extrinsic evidence of the States' "contemporaneous construction" of the Compact since 1905 is also misplaced. Contrary to New Jersey's submission, since this Court resolved the boundary line within the twelve-mile circle, Delaware has consistently regulated structures that extend from the New Jersey side of the river into Delaware territory, under its statutes governing the use of subaqueous lands as well as the DCZA.

In 1961, Delaware adopted its first statute governing the leasing of subaqueous lands. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). In 1966, Delaware adopted a more comprehensive Underwater Lands Act containing provisions governing the lease of subaqueous lands by the State. *See* 55 Del. Laws ch. 442, § 1; Del. Code Ann. tit 7, §§ 6151-6159 (repealed 1986). In 1986, Delaware adopted its current Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72. Under these statutes, Delaware has exercised jurisdiction over subaqueous lands within the twelve-mile circle from 1961 to the present without objection from New Jersey, issuing at least 11 leases of Delaware subaqueous lands for projects that extend either from the New Jersey shore

or from the Delaware shore to the New Jersey shore. *See* DE App. 66a-68a (Maloney Aff. ¶¶ 3-14).[33]

For example, in 1962, Delaware executed a 20-year lease with the SunOlin Chemical Company for the construction and operation of underwater pipelines across the Delaware River. *See id.* at 66a (Maloney Aff. ¶ 4). On October 9, 1963, Delaware issued a 10-year subaqueous land lease to the Colonial Pipeline Company. *See id.* (Maloney Aff. ¶ 5). In 1971, Delaware granted a lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility near the New Jersey shore. *See id.* at 67a (Maloney Aff. ¶ 6). In 1982, Delaware granted DuPont permission to repair and replace a 36-pile cluster near its Deepwater, New Jersey facility. *See id.* (Maloney Aff. ¶ 7). In 1987, Delaware issued leases to the Columbia Gas Transmission Corp. and the Colonial Pipeline Company for the construction of pipelines across the river. *See id.* (Maloney Aff. ¶¶ 8-9). In 1991, DNREC executed a 10-year subaqueous lands lease that allowed Keystone Cogeneration Systems to construct an unloading pier for a facility in Logan Township, New Jersey, and to dredge subaqueous soil within the twelve-mile circle; Delaware executed a 20-year renewal of that lease in 2001. *See id.* (Maloney Aff. ¶ 10).

In 1996, Delaware granted a lease to allow NJDEP to rehabilitate a pier and to construct a ferry dock on Delaware subaqueous soil near Fort Mott State Park in New Jersey. *See id.* at 67a-68a (Maloney Aff. ¶ 11). In 1997, Delaware issued a lease allowing Delmarva Power and Light Company to install fiber optic cable within the twelve-mile circle, extending from Pigeon Point in Delaware to Deepwater Point in New Jersey. *See id.* at 68a (Maloney Aff. ¶ 12). In May 2005, Delaware entered into

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[33] "Maloney Aff." refers to the Affidavit of Kevin P. Maloney, which can be found at DE App. 65a-68a

a lease allowing Fenwick Commons to fill Delaware subaqueous lands at the Penns Grove Riverfront and Pier, in Penns Grove, New Jersey. *See id.* (Maloney Aff. ¶ 14). It is therefore beyond dispute that Delaware has continuously — and, until very recently, without objection from New Jersey — regulated the use of its subaqueous lands in connection with projects that either extend from the New Jersey side of the river or extend from Delaware to the New Jersey shore.[34]

In addition to enforcing its subaqueous lands statutes, Delaware has consistently exercised jurisdiction over such projects under the DCZA following enactment of that statute in 1971. In 1972, Delaware issued a status determination under the DCZA to El Paso Eastern Company advising that its plan to build an LNG terminal extending from the New Jersey side of the river into the twelve-mile circle was prohibited. *See id.* at 8a-12a (Cherry Aff. Ex. A). By letter dated February 23, 1972, Delaware notified the Commissioner of NJDEP of the pending application and solicited comments. *See id.* at 74a (Letter from John Sherman, Planner III, Delaware Planning Office, to Richard Sullivan, Commissioner, NJDEP (Feb. 23, 1972)). By letter dated March 2, 1972, the New Jersey Commissioner responded that it would be useful to communicate on matters of joint interest, but expressed no objection to Delaware's jurisdiction over the application. *See id.* at 13a-14a (Cherry Aff. Ex. B). New Jersey's assertion that Delaware "did not actually block a project until 2005," NJ Br. 33, is thus incorrect.[35]

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[34] New Jersey's observation that in two instances private parties have questioned whether Delaware had authority to regulate within the twelve-mile circle, *see* Br. 15, 32-33, in no way undermines the conclusion that Delaware's course of performance has been to exercise its rights under the Compact. *Cf. New Jersey v. Delaware*, 291 U.S. at 375-77 (rejecting New Jersey's argument that wharf-building by its citizens acquired prescriptive rights in Delaware soils).

[35] New Jersey's failure to acknowledge that Delaware issued a status determination that the El Paso project was prohibited under the

In the late 1970s and 1980s, both Delaware and New Jersey officials further confirmed the applicability of the DCZA to projects entering Delaware from the New Jersey shore. On October 5, 1978, the Delaware Attorney General's Office issued Opinion No. 78-018, stating that the DCZA's exemption for docking facilities serving a single manufacturing facility would apply to docking facilities located in Delaware and serving a facility in New Jersey. *See* DE App. 77a. In August 1980, NJDEP submitted a final Environmental Impact Statement to the U.S. Department of Commerce that clearly acknowledged Delaware's authority to regulate projects extending into Delaware territory under its coastal management program. *See* NJDEP & NOAA, *New Jersey Coastal Management Program and Final Environmental Impact Statement* (Aug. 1980) ("Final EIS") (excerpted at DE App. 79a-83a). NJDEP stated that, because the relevant "Delaware – New Jersey State boundary" was "the mean low water line on the eastern (New Jersey) shore of the Delaware River," "[t]he New Jersey and Delaware Coastal Zone Management agencies . . . have concluded that any New Jersey project *extending beyond* mean low water must obtain coastal permits from both states." DE App. 82a (Final EIS at 20). NJDEP further explained that "New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." *Id.* at 82a-83a. Finally, with respect

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DCZA is particularly inexplicable because the CZICB specifically relied on that prior determination in refusing to authorize the Crown Landing project. *See* DE App. 60a (Cherry Aff. Ex. H (CZICB Decision and Order at 10)) (noting DNREC's argument that "the more relevant precedent, cited by several public speakers, is the 1972 denial of a permit to the El Paso Eastern Company for the construction of a pier in Delaware waters serving an LNG terminal in New Jersey"; noting that the El Paso project denial cited an analysis of the DCZA from the Delaware Attorney General; and finding that "a similar analysis applies to the proposed Crown Landing construction").

to the Crown Landing project itself, NJDEP's Office of Dredging and Sediment Technology advised BP on February 4, 2005, that "activities taking place from the mean low water line . . . outshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations." *Id.* at 85a (Letter from David Q. Risilia, ODST, to David Blaha, Environmental Resources Management (Feb. 4, 2005)).

Just as Delaware continued to regulate projects extending into its territory after this Court's 1934 decision, New Jersey continued to grant leases, licenses, or conveyances to private and governmental entities for riparian structures. New Jersey's activities, however, are in no way inconsistent with Delaware's jurisdiction over its territory within the twelve-mile circle. With the exception of the El Paso and Keystone facilities discussed above, as well as structures requiring licenses to dredge Delaware's subaqueous soil, those riparian projects did not necessitate Delaware's exercise of its authority under the DCZA or the subaqueous lands statutes. For example, Delaware did not object to New Jersey's issuance of permits for the Carney's Point project, the Keystone project, the Fort Mott project, or the two Pennsville Township projects (which involved de minimis extensions of 30 feet and 9 feet into Delaware territory). *See* NJ App. 70a-72a (Broderick Aff. ¶¶ 11-16). Unlike the Crown Landing project, those projects either did not implicate Delaware concerns or were otherwise regulated by Delaware.

Since this Court's 1934 boundary determination, New Jersey has also taken regulatory actions with respect to water intake and discharge that did not interfere with Delaware's jurisdiction and interests, and therefore provoked no protest from Delaware. For example, Delaware did not oppose New Jersey's issuance of permits regarding discharge of water within the twelve-mile circle because such permits are already subject to federal standards and are monitored by the Delaware River and Bay Commission, of which Delaware is a member. *See* DE App. 63a-

64a (Hansen Aff. ¶¶ 2-5)[36] (explaining that both EPA and the Delaware River Basin Compact require New Jersey to satisfy Delaware water-quality standards, eliminating the need for Delaware to issue separate permits). Delaware did not object to New Jersey's issuance of permits relating to water withdrawal at the Keystone project, *see* NJ App. 64a (Sickels Aff. ¶ 8), in large part because Delaware has a say in such permits through the approval and modification process of the Delaware River and Bay Commission. *See* Del. Code Ann. tit. 7, § 6501 (Art. 10, § 10.1) ("[t]he Commission may regulate and control withdrawals and diversions from surface waters and ground waters of the basin").

In the face of Delaware's consistent and substantial exercises of jurisdiction over wharves and other structures appurtenant to New Jersey that extend into Delaware, New Jersey relies on two New Jersey cases that it claims demonstrate that New Jersey acted "under the 1905 Compact to regulate activities occurring on riparian structures." Br. 31. In *State v. Federanko*, 139 A.2d 20 (N.J. 1958), however, the New Jersey court simply purported to apply Article I of the Compact in holding that "ownership of subaqueous soil by one state does not stand in the way of an agreement with its neighbor on the other side for a sharing of the criminal jurisdiction over the river." *Id.* at 33; *see id.* at 36 ("administering the criminal law on the easterly half of the river for the full frontage of Salem County as our State had solemnly agreed with Delaware to do"). The New Jersey court neither cited nor suggested it was acting pursuant to Article VII. In the other case relied on by New Jersey (at 31), the court interpreted Article VII to permit New Jersey to tax a wharf in the twelve-mile circle, but that lone example, in a New Jersey case where Delaware was not a party, in no way bears on Delaware's course of performance under the Compact.

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[36] "Hansen Aff." refers to the Affidavit of R. Peder Hansen, which can be found at DE App. 62a-64a.

See Main Assocs., Inc. v. B. & R. Enters., Inc., 181 A.2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962).

New Jersey's reliance on the Delaware State Highway Department's 1957 "resolution" disavowing jurisdiction over a proposed project by Dupont, *see* Br. 31-32, is also misplaced. First, a letter by the Highway Department's outside counsel, Samuel Arsht, simply concurring in DuPont's counsel's interpretation of the 1905 Compact (without any indication that either attorney was aware of the 1954 Formal Opinion of the New Jersey Attorney General directly contrary to DuPont's counsel's interpretation) in no way binds Delaware or other Delaware agencies to that interpretation.[37] Second, the Highway Department did not adopt its outside lawyer's interpretation of the Compact or express a view that Delaware lacked authority to regulate projects extending from the New Jersey shore into Delaware territory. On the contrary, the Highway Department merely stated that, "taking cognizance of" its lawyer's opinion, it would advise the Corps that "the Department has no jurisdiction over the area mentioned." NJ App. 109a-110a (Donlon Aff. Ex. G).

The Highway Department did not conclude that *Delaware* lacked jurisdiction to regulate within the twelve-mile circle or that the 1905 Compact stripped Delaware of authority over projects originating on the New Jersey side of the river. Even if it had, the Department's conclusion would not bind the State or other Delaware agencies. The Delaware legislature's decision in 1961 to regulate Delaware subaqueous lands after Arsht opined that Delaware

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[37] Arsht was a private lawyer with the firm of Morris, Steel, Nichols & Arsht at the time he was Counsel to the Delaware State Highway Department. *See* NJ App. 109a-110a. Moreover, even if Arsht had been an agent of Delaware, neither the State nor any of its agencies had conferred on him the authority to issue binding interpretations of the Compact. *Cf. Lee v. Munroe*, 11 U.S. (7 Cranch) 366, 369 (1813) (holding that the government is not bound by mistaken representations of an agent unless it is clear that the representations were within the scope of the agent's authority).

lacked jurisdiction to do so within the twelve-mile circle indicates that the legislature did not share Arsht's incorrect view of Delaware's authority. *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966). Finally, the 1957 Highway Department resolution preceded passage of Delaware's Underwater Lands Act adopted in 1966 and the DCZA in 1971. The resolution thus carries no weight in evaluating Delaware's course of performance in enforcing its subaqueous lands statutes and its coastal management program against projects that extend from the New Jersey shore into Delaware territory.

5. New Jersey's reliance on Delaware's alleged "concessions" in the 1934 boundary case is misplaced

New Jersey claims that, in the course of litigating the boundary case nearly 30 years after entry of the 1905 Compact, private counsel retained by Delaware "conceded both the right of New Jersey citizens to wharf out to navigable water and the exclusive right of New Jersey to regulate the exercise of those rights." Br. 27-28; *see id.* at 27-30. As shown above, however, the plain language of the Compact cannot be read to give New Jersey exclusive riparian jurisdiction in Delaware waters. Moreover, New Jersey's reliance on counsel's statements is misplaced for several reasons and in any event cannot fairly bind Delaware in the context of the issues presented in this case.

First, the scope of riparian jurisdiction in Article VII of the Compact was not at issue in the boundary case. Rather, New Jersey argued that the Compact had transferred *title* of the eastern half of the river from Delaware to New Jersey. This Court rejected that argument out of hand, explaining that "[t]he compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *New Jersey v. Delaware*, 291 U.S. at 377-78. Thus, the Court plainly held that nothing in the Compact transferred title of any Delaware lands to New Jersey. The

Court's opinion did *not*, however, interpret the scope of Article VII's "riparian jurisdiction."

Second, in one of the statements on which New Jersey relies, counsel made quite clear that Delaware was arguing in the alternative: "'*Even if* the Compact of 1905 be construed as ceding to the State of New Jersey the right to determine to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way.'" NJ Br. 30 (quoting NJ App. 237a) (emphases added and deleted). Delaware simply made the point that, "even if" the Compact gave New Jersey riparian jurisdiction (whether exclusive or concurrent) over wharves extending from New Jersey into Delaware, the Compact did not support New Jersey's claim to title to Delaware soil. *See* NJ App. 183a (Delaware Reply Brief to Special Master) ("The conclusion . . . is that the exercise of riparian rights by the inhabitants of the Province of New Jersey was not in any sense hostile or adverse to the ownership of the soil by William Penn.")

New Jersey further seeks to exploit a statement by Delaware's counsel that "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." *Id.* at 186a. But New Jersey makes too much of that statement, for the very next sentence of the brief stresses Delaware's ultimate ownership (and therefore control) of the subaqueous lands on which such riparian rights might be exercised: "That the Compact of 1905 left the title to the subaqueous soil unaffected is clear from the express language of Article VIII." *Id.* Thus, understood in context, Delaware counsel was merely acknowledging that New Jersey could decide who could exercise riparian rights from the New Jersey shore, and that its regulations would apply to those structures even if they extended into Delaware lands. But, given the importance of title to a State's lands and the important inci-

dence of sovereignty over a State's submerged lands, which Delaware counsel repeatedly invoked throughout the litigation, counsel's statement cannot fairly be understood to mean that Delaware itself would *not* have any regulatory authority over riparian structures built on Delaware lands. At most, counsel's statement was a recognition of the obvious principle that, where a structure traverses two States, both have regulatory jurisdiction with respect to those parts of the structure within the State's boundary. *See, e.g., McGowan v. Columbia River Packers' Ass'n*, 245 U.S. 352, 357-58 (1917) (holding that State cannot remove structure on neighboring State's submerged lands in navigable river that forms boundary between the two States).

Finally, to the extent this Court perceives any tension between Delaware's position today and in certain isolated statements from the boundary case, Delaware should not be taken to have conceded an issue that was not presented to the Court for adjudication.[38] The Court's opinion in the boundary case in no way relied on and did not rule on any arguments concerning the scope of Article VII's riparian jurisdiction. *Cf. New Hampshire v. Maine*, 532 U.S. at 751 (applying judicial estoppel because "interpretation of the words 'Middle of the River' . . . was 'necessary' to fixing the . . . boundary" in the prior litigation).[39]

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[38] New Jersey presumably intends to claim judicial estoppel. That doctrine, however, is inapplicable where the party's statement was not relied on by the Court to rule in that party's favor. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations." *Id.* (internal quotation marks omitted).

[39] The special master's report adopted by the Court, *see New Jersey v. Delaware*, 295 U.S. 694, 694 (1935), found that "[b]y the Compact of 1905 between the States of New Jersey and Delaware the State of Delaware recognized the rights of riparian owners to wharf out on the easterly side of the Delaware River within the twelve-mile circle. By said Compact the State of Delaware did not convey to the State of New Jersey title to any part of the Delaware River or to any part of the subaqueous soil thereof, and said Compact did not in anywise alter or

Application of any estoppel principle would be particularly inappropriate here, given that counsel's arguments are not "clearly inconsistent with its earlier position." *Id.* at 750 (internal quotation marks omitted). Here, the conditional nature of Delaware's statements undercuts New Jersey's assertion that Delaware could concede an issue that was in no way necessary to resolution of the boundary dispute. Nor is there any "unfair advantage" in permitting Delaware to litigate an issue not decided by the Court in the boundary case. *Id.* at 751.[40]

Any application of judicial estoppel here would be especially unwarranted given that the lands implicated by New Jersey's attempt here to exercise "exclusive" riparian jurisdiction involve public lands held in trust by Delaware for its citizens. As this Court has explained, "'broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests.'" *New Hampshire v. Maine*, 532 U.S. at 755 (quoting 18 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 4477, at 784 (1981)).

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affect the boundaries of the respective states." NJ App. 256a; *see also* NJ Br. 28. Thus, as the report states, its reference to the scope of the Compact was not necessary to resolving the disputed boundary issue. *See Bennis v. Michigan*, 516 U.S. 442, 450 (1996) ("[I]t is to the holdings of our cases, rather than their dicta, that we must attend.") (internal quotation marks omitted); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("Breath spent repeating dicta does not infuse it with life."). In any case, the special master did *not* find that New Jersey's Article VII riparian jurisdiction was exclusive, as New Jersey must have it in order to prevail.

[40] Finally, this Court has recognized that "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 532 U.S. at 753 (internal quotation marks omitted). The Delaware statements cited by New Jersey are not accompanied by any textual analysis of the Compact. *Cf. supra* pp. 45-56. Indeed, the private counsel representing Delaware in the boundary case couched one statement as being merely "'in my view,'" NJ Br. 28 (quoting NJ App. 191a), and thus should not be deemed to be the considered interpretation of the State of Delaware.

Thus, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).[41]

D. *Virginia v. Maryland* Does Not Deny Delaware The Right To Exercise Its Coastal Zone Laws And To Reject A Structure Built On Delaware Subaqueous Lands

New Jersey (at 27) cites *Virginia v. Maryland* for the proposition that Article VII should be read to grant New Jersey the exclusive authority over BP's project that it claims. Although that case may appear to share some surface similarities with this one, at root it raises fundamentally different concerns and involves different legal principles.

The case arose out of Maryland's ownership of the bed of the Potomac River to the low-water mark on the Virginia side. In 1996, Fairfax County, Virginia, applied to Maryland for a permit to withdraw water from the river. Several Maryland officials objected because the water would divert economic growth and development from Maryland to Virginia. Maryland initially denied the permit on the ground that the county had not demonstrated a sufficient need for the water, but in 2001 it approved the permit. However, the Maryland legislature placed a limit on the amount of water that could be withdrawn. Maryland therefore conceded Virginia's right to withdraw water but argued that its sovereignty over the bed

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[41] The Court found this principle inapplicable in *New Hampshire v. Maine*, because it found that "New Hampshire advances its new interpretation not to enforce its own laws within its borders, but to adjust the border itself." 532 U.S. at 756. Here, Delaware seeks to enforce its own laws within its own undisputed territory.

gave it the right to regulate the amount of Virginia's withdrawals.

In rejecting Maryland's position and upholding the right of Virginia to withdraw water for the use of its citizens, this Court held that a 1785 Compact gave Virginia immunity from Maryland sovereignty over a portion of the bed of the Potomac awarded to Maryland more than a century after the compact became law. The Court reasoned that the language in Article Seventh of the 1785 Compact gave the citizens of each State "full property in the shores of [the] Potowmack river adjoining their land, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements," 540 U.S. at 62, and therefore settled the issue at a time when the location of the boundary between the two States and thus control over the river was contested. Article IV of the subsequent boundary award gave Virginia "a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding navigation or otherwise interfering with the proper use of it by Maryland." *See id.* at 62-63. The Court held that Virginia gained the right "to use the River beyond low-water mark . . . *qua* sovereign." *Id.* at 72.

Virginia v. Maryland is readily distinguishable from New Jersey's present dispute with Delaware. Fundamentally, that case involved an application of the well-established principle of equitable apportionment, pursuant to which sovereigns on both sides of a shared river are permitted to draw out water for their citizens' use. That is a different legal regime from the public-trust doctrine, which vests special sovereign attributes in the submerged lands owned by a sovereign.

Even aside from that fundamental distinction, Article VII of the 1905 Compact is limited to a continuation of the exercise of "riparian jurisdiction" and does not involve the grant of ownership in submerged lands or a cession of any public trust responsibility with respect to those lands. By

contrast, the 1785 Maryland-Virginia Compact gives an unconditional right to wharf out. *See Virginia v. Maryland*, 540 U.S. at 62. Such a provision would have been consistent with the common law at the time when the right was only subject to the principle that a wharf not constitute a nuisance by interfering with navigation. Article VII of the 1905 Compact, however, is more limited because, by 1905, the right to wharf out was more contingent and subject to the additional limitations imposed by a sovereign if the wharf was not deemed to be in the public interest. *See supra* pp. 43-45.

Moreover, Maryland's objections to Virginia's use of the Potomac and the way Maryland tried to implement its objections raise serious legal issues not present in Delaware's denial of BP's request for a coastal zone permit. Nor did Maryland's objections have any connection to a legitimate interest of that State. Maryland initially asserted the right to control all of the water in the river for the benefit of its citizens. It then unilaterally decided Virginia's share of the river. At oral argument, however, Maryland conceded that Virginia's withdrawal pipe would have no adverse impact on Maryland or its residents. *See* Oral Arg. Tr., *Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915, at *11 (Oct. 7, 2003).

Maryland's actions also violated other bedrock principles of Federal law. Under the dormant Commerce Clause, a State may not withhold resources, including water, from interstate commerce, *see Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), or from a co-riparian state, *see Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024-25 (1983). Maryland violated the second principle by, in effect, unilaterally allocating the waters of the Potomac. That effort ran afoul of the three means recognized by this Court for allocating interstate waters: (1) an original equitable apportionment action in the Supreme Court, (2) an interstate compact, or a (3) congressional Act. Because none of those actions had occurred, the Court could have upheld Virginia's claim without deciding

that Maryland had surrendered its sovereign rights, and indeed suggested as much. *See* 540 U.S. at 74 n.9.

The third distinction between the two cases is that Delaware is not interfering with a recognized interest of New Jersey in the Delaware River as Maryland did in *Virginia v. Maryland*. There is an important difference between the use of water and the construction of enormous structures on the submerged lands of the river. This Court upheld Virginia's right to use the waters of the Potomac as a sovereign, a use well known in water law as a usufructory right. *See id.* at 72. That right, however, is distinct from ownership. The general rule is that no one can own the waters of a river; one can only obtain a lesser right to use them. Ultimately, *Virginia v. Maryland* was a "use" dispute, whereas New Jersey here has implicated Delaware's sovereign right to decide how the subaqueous lands that it indisputably owns should be utilized. New Jersey has no common law or federal constitutional right in Delaware's decision because that decision involves the control of Delaware territory. Any right, if one exists, must come from the 1905 Compact. As we have shown, no such right emanates from the plain language or purposes of that Compact.

III. APPOINTMENT OF A SPECIAL MASTER IS WARRANTED IF THE COURT TAKES JURISDICTION OVER THIS CASE BUT CANNOT RESOLVE IT SUMMARILY AGAINST NEW JERSEY

This Court routinely appoints a Special Master in cases involving disputes between two States about the meaning of an interstate compact or their respective rights to use the waters of an interstate waterway. *See, e.g., Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Nebraska v. Wyoming*, 515 U.S. 1 (1995) (appointing a Special Master in a case brought by Nebraska to enforce a

1945 decree by this Court); Robert L. Stern, *et al.*, *Supreme Court Practice* § 10.12, at 576 (2002). This Court should follow the same procedure here, in the event that this Court takes jurisdiction over this case but cannot resolve it based on any of the substantive grounds presented above.

A Special Master would be best positioned to consider, in the first instance, the extensive historical evidence that each State could be expected to put forward. Delaware would submit historical evidence about each State's riparian rights within the twelve-mile circle under common law and applicable state statutes — as well as evidence of the historical exercise of those rights — prior to the 1905 Compact. Delaware would also seek to introduce historical evidence demonstrating each State's intent at the time it signed the Compact. And Delaware would put forward course-of-performance evidence from the 100 years that have passed since the signing of the Compact. Not only are these fact-finding duties best entrusted to a Special Master in the first instance, but a Special Master would be able to preside over the discovery process, as Delaware continues its efforts to gather historical materials in New Jersey's possession that pertain to these various issues.[42]

Without acknowledging this Court's normal practice of appointing a Special Master in cases comparable to this one or this Court's sound reasons for that practice, New

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[42] On August 25, 2005, Delaware's Attorney General, M. Jane Brady, made a preliminary request to New Jersey's Attorney General, Peter C. Harvey, for certain documents relating to the allegations in New Jersey's Motion to Reopen and Request for a Supplemental Decree. While New Jersey permitted counsel for Delaware to inspect certain public documents in September and October 2005, as late as the week of October 24, 2005, only days before Delaware's Brief in Opposition to New Jersey's Motion was due, New Jersey produced a significant amount of documents that Delaware has not had a reasonable opportunity to review prior to the deadline for filing its brief. Delaware, as a result, has not been able to complete its review of all of the relevant facts for this complicated historical proceeding that may be included in New Jersey's most recent production.

Jersey asserts that this Court ought not follow that practice here. *See* NJ Br. 33-34. But the few cases on which New Jersey relies are inapposite. As an initial matter, the Court's decision in *Virginia v. Maryland*, 540 U.S. 56 (2003), which was based on its review of a Special Master's report, supports the appointment of a Special Master here as well. Although New Jersey asserts (at 33-34) that *Virginia v. Maryland* "decided a similar legal issue" as the issue presented here, that case involved withdrawal of water from a river. *See, e.g.*, 540 U.S. at 63. Here, by contrast, New Jersey couches the construction of a massive bulk transfer facility 2,000-feet long and 50-feet wide, with the attendant dredging of 27 acres of Delaware land, as a separate riparian right "to wharf" out to navigable waters. Even if such a facility could be viewed simply as "wharfage," historically such rights have been subject to clear limitations on the uses to which such wharves can be put. *See supra* pp. 43-45.

In any event, this Court made clear that its decision in *Virginia v. Maryland* turned not on generally applicable legal principles, but instead on the specific terms of "Article Seventh of the 1785 Compact [between Virginia and Maryland] and Article Fourth of the Black-Jenkins Award," such that resolution of the dispute "obviously require[d] resort to those documents." 540 U.S. at 65-66. Because a different compact, with a different history and course of performance are at issue here, this Court's decision in *Virginia v. Maryland* provides no basis for dispensing with the appointment of a Special Master.

Furthermore, the circumstances here are decidedly unlike those in *California v. United States*, 457 U.S. 273 (1982), and *New Hampshire v. Maine*, 532 U.S. 742 (2001), where this Court did not appoint a Special Master. *See* NJ Br. 34. *California v. United States* involved a narrow "choice-of-law issue," as to which this Court found that "[n]o essential facts [were] in dispute." 457 U.S. at 278. But that is not the case here, where Delaware and New Jersey currently dispute a number of essential facts,

involving the historical exercise of riparian rights within the twelve-mile circle, the parties' intent in framing the 1905 Compact, and the inferences to be drawn from each State's course of performance since 1905. *New Hampshire v. Maine* is equally inapposite, as the Court found that it could "pretermit the States' competing historical claims" because New Hampshire was judicially estopped from disputing Maine's claim that a "1740 decree and [a] 1977 consent judgment divided the Piscataqua River at the middle of the main channel of navigation." 532 U.S. at 748. The Court could not avoid reaching the parties' historical disputes here on that same ground because, as shown above, no position taken by Delaware in prior litigation with New Jersey judicially estops Delaware from disputing New Jersey's claim of exclusive jurisdiction to govern the uses of structures built out onto land owned by Delaware within the twelve-mile circle. *See supra* pp. 68-71.

Given the complexity of the historical facts and the attendant legal principles, the Court likely would obtain substantial benefits from a Special Master's distillation of the issues and a recommendation on how this Court should resolve them.

CONCLUSION

For the foregoing reasons, this Court should dismiss New Jersey's pleading for lack of jurisdiction. If the Court takes jurisdiction over New Jersey's pleading, it should deny New Jersey's request for declaratory and injunctive relief because Delaware has the right, as a sovereign and under the 1905 Compact, to regulate the manner in which BP intends to construct a massive LNG bulk product transfer facility within Delaware's territory. If the Court finds that it cannot resolve this case against New Jersey based on the arguments presented herein, the Court should follow its customary practice and appoint a Special Master to hear evidence and make a recommendation on the resolution of this dispute.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

App.		Page
1	Affidavit of Philip Cherry in Opposition of Motion to Reopen and for a Supplemental Decree (Oct. 24, 2005)	1a
2	Affidavit of R. Peder Hansen in Opposition of Motion to Reopen and for a Supplemental Decree (Oct. 21, 2005)	62a
3	Affidavit of Kevin P. Maloney in Opposition of Motion to Reopen and for a Supplemental Decree (Oct. 23, 2005)	65a
4	Formal Opinion 1954 No. 3, 1954 N.J. Op. Atty. Gen. 6 (Feb. 2, 1954)	69a
5	Letter from John Sherman, Delaware Planning Office, to Richard Sullivan, New Jersey Dep't of Environmental Protection (Feb. 23, 1972)	74a
6	Opinion No. 78-018, 1978 Del. Op. Atty. Gen. (Oct. 5, 1978)	75a
7	New Jersey Dep't of Environmental Protection & National Oceanic and Atmospheric Administration, *New Jersey Coastal Management Program and Final Environmental Impact Statement* (Aug. 1980) (excerpt)	79a
8	Letter from David Q. Risilia, New Jersey Dep't of Environmental Protection, to David Blaha, Environmental Resources Management (Feb. 4, 2005)	84a

9 Federal Energy Regulatory Commission, *Draft Environmental Impact Statement: Crown Landing LNG and Logan Lateral Projects* (Feb. 2005) (excerpt) 139a

10 4 N.J. Comp. St., Riparian Rights (1911)..... 144a

APPENDIX 1 – AFFIDAVIT OF PHILIP CHERRY DATED OCTOBER 24, 2005

No. 11, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

AFFIDAVIT OF PHILIP CHERRY IN OPPOSITION OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

Philip Cherry, being duly sworn, deposes and says:

1. I am the Director of Policy and Planning for the Delaware Department of Natural Resources and Environmental Control ("DNREC"), an agency of the State of Delaware. I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by DNREC.

2. From 1983 to 1990, I was employed by the Division of Water Resources of DNREC, initially as a geohydrolo-

gist and later as the manager of the Water Supply Branch. In 1990, I was promoted and served as the Pollution Prevention Program Director for DNREC until 1993. From 1993 to 1998, I served as an executive assistant to the Secretary of DNREC representing DNREC on legislative matters. In 1998, I left DNREC to act as a legislative liaison for then Governor (now Senator) Thomas Carper. In December 2000, I returned to DNREC to serve in my current position, Director of Policy and Planning.

3. As part of my responsibilities as Director of Policy and Planning for DNREC, I supervise the administration of the Delaware Coastal Zone Act. Del. Code Ann. tit. 7, § 7001 *et seq.* (herein, the "DCZA" or the "Act"). I report directly to the Secretary of DNREC on all DCZA issues and applications.

4. The DCZA, adopted in 1971, begins with a statement of legislative policy and purpose declaring that "the coastal areas of Delaware are the most critical areas for the future of the State in terms of the quality of life in the State." Del. Code Ann. tit. 7, § 7001. Under the Act, the "declared public policy" of Delaware is "to control the location, extent and type of industrial development in Delaware's coastal areas." *Id.* The Act specifically finds that "offshore bulk transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." For these reasons, the Act declares that an absolute "prohibition against bulk transfer facilities in the coastal zone is deemed imperative." *Id.* Section 7003, "uses absolutely prohibited in the coastal zone," implements this policy by providing that "offshore gas, liquid or solid bulk product transfer facilities which are not in operation on June 28, 1971, are prohibited." Del. Code Ann. tit. 7, § 7003. Delaware's coastal zone consists of land, water, and subaqueous land within the territorial limits of Delaware in the Delaware River, including the water and subaqueous soil within a twelve-mile arc from the

town of New Castle, Delaware, which is known as the Twelve Mile Circle. Del. Code Ann. tit. 7, § 7002(a).

5. In December 1971, the El Paso Eastern Company ("El Paso") submitted a proposal to construct a liquefied natural gas ("LNG") terminal in New Jersey, opposite Claymont, Delaware, which also proposed extending a pier into Delaware territory within the Twelve Mile Circle. On February 23, 1972, the State Planner, then charged with administering the DCZA, issued a status decision rejecting El Paso's proposed LNG terminal as a prohibited use under the DCZA. Exhibit "A." The State Planner apprised New Jersey officials of El Paso's proposal and Delaware's application of the DCZA to the proposal. Delaware's files indicate that New Jersey expressed no objection to Delaware's application of the DCZA to the El Paso proposal. Exhibit "B."

6. In 1972, the Federal government adopted the Coastal Zone Management Act ("CZMA") pursuant to which coastal states were authorized to develop a Coastal Zone Management Plan. 16 U.S.C. § 1451 *et seq*. In 1979, the Office of Coastal Resource Management of the National Oceanic and Atmospheric Administration, within the U.S. Department of Commerce, approved Delaware's Coastal Zone Management Plan, which includes the DCZA, as part of Delaware's final Environmental Impact Statement under the Federal Coastal Zone Management Program. Delaware's Plan was updated and approved in 1995, 1998 and 2003. Delaware's Coastal Zone Management Plan states that there is no site in Delaware suitable for the location of any LNG import-export facility.

7. On July 13, 1990, Keystone Cogeneration Systems Inc. ("Keystone") (currently known as the Logan Generating Company) applied to DNREC for a status decision relating to its proposal to build a 200 megawatt coal-fueled cogeneration facility in Logan Township, New Jersey, including an 1,100 foot pier extending into Delaware waters. In a status decision issued November 19, 1990,

DNREC determined that the project did not constitute a prohibited bulk product transfer facility under the DCZA because it fell within a statutory exception for a single use industrial or manufacturing facility. Exhibit "C." However, DNREC required Keystone to satisfy the permitting requirements under the DCZA. A review of Delaware's files indicates that New Jersey did not object to Delaware's enforcement of the DCZA with respect to Keystone's project.

8. In 2002, representatives of British Petroleum, through its wholly owned indirect subsidiary, Crown Landing, LLC (herein, "BP") contacted DNREC regarding a proposal to construct an LNG terminal partially within Delaware waters. At that time, BP advised DNREC that the majority of the offshore unloading facility for the proposed project would be located in Delaware waters within the boundaries of New Castle County, Delaware. The related onshore facilities would be located in Logan Township, New Jersey. BP stated that approval under the DCZA would be required because the project is partially located in Delaware territory.

9. BP's representatives advised DNREC that one of the primary advantages of the proposed site is the proximity to natural gas transmission pipelines. BP, however, has alternate available sites where it could locate its proposed facility in the Delaware River outside Delaware's coastal zone (including sites in Logan Township, New Jersey, Greenwich Township, New Jersey, Paulsboro Borough, New Jersey, and West Deptford, New Jersey).

10. On September 27, 2004, BP submitted an application to DNREC for permission to perform approximately nineteen tests including geotechnical test borings in the Delaware River to gather information for the design of a receiving terminal to support the proposed LNG facility. Exhibit "D." On October 29, 2004, after public comments were received on BP's application for geotechnical test borings in the Delaware River, Laura M. Herr, the Pro-

gram Manager of DNREC's Wetland and Subaqueous Lands Section, advised BP that DNREC could not make a decision on the application until a determination was made on whether construction of an LNG facility is an activity permitted in Delaware's coastal zone. Exhibit "E." On November 4, 2004, BP withdrew its geotechnical test boring application. Exhibit "F."

11. On December 7, 2004, BP filed a request under the DCZA seeking a status decision by the Secretary of DNREC as to whether the proposed LNG facility would be a permitted use under the DCZA.

12. BP's request stated that the proposed LNG terminal docking facility would consist of a 2,000-foot-long pier and a single berth. The supertankers berthing at the docks would range from 914 to 1,056 feet in length and would transport from 138,000 to 200,000 cubic meters of LNG.

13. If BP's proposed LNG terminal were built, BP would be required to initially dredge 800,000 cubic yards of Delaware subaqueous land (approximately 27.4 acres) below the Delaware River to a depth of 40 feet below the mean water line to dock the supertankers. Thereafter, because of sedimentation, BP or others would be required to dredge of 60,000–90,000 cubic yards per year of Delaware's subaqueous land to enable the supertankers to navigate the Delaware River.

14. BP's proposed LNG terminal would include a docking facility that would extend 2,000 feet from the New Jersey shore into Delaware territory and would be 50 feet wide. The facility would also include a 6,000 square foot unloading platform in Delaware territory. The trestle is designed to provide structural support for cryogenic piping, a containment trough, and utility lines from shore to berth. The trestle will also accommodate two travel lanes for light vehicles. This pier would be supported on approximately 80 steel pilings, each three feet in diameter and 100-120 feet long which are anchored into the riverbed.

15. The proposed LNG terminal would be expected to receive two to three ships per week. These ships would navigate up the Delaware River, by the Salem Nuclear Power Plant, under the Delaware Memorial Bridge (a major interstate bridge that connects New Jersey and Delaware), and past densely populated areas of New Castle County, Delaware, including its largest city, Wilmington, and the towns of New Castle, Delaware City, and Claymont. These communities could be within a potential hazard area during the LNG supertanker transit.

16. When the proposed LNG supertankers are in transit, a moving safety and security zone would restrict other vessels 3,000 feet ahead and behind and 1,500 feet on all sides of the supertanker. When docked, a temporary hazard area would exist around the unloading facility during the period when the ship is at the dock. The LNG supertankers would be docked at the BP facility approximately 30 to 40 percent of each year.

17. In January of 2005, DNREC published notices inviting public comment on BP's request for a coastal zone status decision. Over 200 public comments were received, all but one urging rejection of the proposal.

18. On February 3, 2005, John A. Hughes, Secretary of DNREC, issued DNREC's status decision on BP's application. In the status decision, Secretary Hughes concluded that the proposed LNG terminal represents a prohibited bulk product transfer facility which is prohibited under the DCZA. Secretary Hughes also held that the proposed facility exhibits characteristics sufficient to deem it heavy industry, which is also prohibited under the DCZA. Exhibit "G."

19. On February 15, 2005, BP filed an appeal of the status decision, which was heard by Delaware's Coastal Zone Industrial Control Board (the "Board") on March 30, 2005. After extensive briefing and a public hearing, the Board issued a decision on April 14, 2005, unanimously affirming the Secretary's determination that BP's pro-

posed LNG terminal is a prohibited bulk transfer facility under the DCZA. Exhibit "H." The Board's decision holds that "the proposed construction is absolutely prohibited by the" DCZA and "no permit therefor may be issued." *Id.* at 10.

20. BP chose to not appeal this decision of the Board to Delaware's Superior Court, as permitted by the DCZA.

/s/ PHILIP CHERRY
Philip Cherry

Subscribed And Sworn To
Before Me This 24th Day
Of October, 2005

/s/ LAURIE MOYER
Notary Public
Of The State Of Delaware

[Notary Stamp omitted]

EXHIBIT A

STATE OF DELAWARE
EXECUTIVE DEPARTMENT
PLANNING OFFICE
DOVER

RUSSELL W. PETERSON
GOVERNOR

DAVID R. KEIFER
DIRECTOR

February 23, 1972

Mr. Barry Huntsinger
El Paso Eastern Company
2727 Allen Parkway
Houston, Texas 77019

Dear Mr. Huntsinger:

This is to inform you of my status decision regarding the El Paso Eastern Company proposed project for a pier within Delaware's jurisdiction in the Delaware River to serve as a tanker berthing facility in connection with a Liquified natural gas terminal near Penns Grove, New Jersey.

The status of the pier facility for this El Paso Eastern Company project is that it is an offshore bulk product transfer facility which is prohibited in the Delaware coastal zone by the terms of Section 7003 of the Coastal Zone Act (Chapter 70, Title 7, Delaware Code). No coastal zone permit may be issued for such a use. This opinion is based on the advice of Attorney General Stabler and my examination of the descriptive material provided in your letter of December 21, 1971.

If you wish to file an appeal from this decision it should be filed within fourteen (14) days of your receipt of this notice on the appeal form provided herein. Items A, B, and E on the appeal form should be filled in, as well as the date of the appeal application. At this time there is no

appeal fee required. The appeal should be sent to the State Coastal Zone Industrial Control Board at the address shown on the appeal application form.

If you have any questions, please contact me.

Sincerely,

/s/ DAVID R. KEIFER
David R. Keifer
Director

DRK/daf

Enclosure

CC: Secretary Austin N. Heller
Commissioner Richard Sullivan

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Wilmington, Delaware

W. LAIRD STABLER, JR.
ATTORNEY GENERAL

January 20, 1972

Mr. David R. Keifer, Director
Planning Office
Executive Department
State of Delaware
Dover, Delaware 19901

Re: Coastal Zone Act – Bulk Transfer Facility
(El Paso Eastern Company)

Dear Dave:

I have reviewed the material submitted to you with regard to the liquid natural gas (LNG) terminal which El Paso Eastern Company proposes to built in New Jersey with docking facilities extending into the Delaware River. I agree with your determination that this facility is an offshore bulk product transfer facility as that term is defined by the Coastal Zone Act. However, there may be some question as to whether or not the terminal is excepted from 7 Del. C. § 7002(f) by virtue of the fact that it is "a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted".

It is my opinion that the El Paso Eastern terminal does not fit within the "single industrial or manufacturing facility" exception. The Delaware courts have uniformly held that the meaning of a statute depends on the intent of the legislature and that such intent must be ascertained from an interpretation of the act as a whole. The facts contained in the letter from the El Paso Eastern

Company indicate that the LNG terminal in question is merely a way station in the natural gas transportation system which El Paso Eastern is endeavoring to develop. It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the "industrial facility" but the docking facility. Further, I assume that the facility proposed by El Paso Eastern is not the type of "single industrial or manufacturing facility" for which your office would grant a permit under 7 Del. C. § 7004. The statute specifically mandates that such approval is necessary.

With specific reference to situations similar to the one here in issue, it is my recommendation that your office more clearly define "single industrial or manufacturing facility". The definition should explicate the legislative intent to allow an exception for docking or pier facilities only where the facilities are to be used in conjunction with industries of the type permitted under 7 Del. C. § 7003. The definition I envision will permit your office to evaluate applications for construction on the New Jersey shore as if they were applications for construction on the Delaware shore. Such a standard would negate claims that applications which require the approval of more than one governmental agency are acted upon by Delaware in an arbitrary or capricious manner. However, it must be clear that Delaware is not attempting to regulate development beyond the state boundary. Therefore, any reference to potential development in New Jersey should be avoided.

If you should wish to discuss this matter further, please do not hesitate to contact me. Also at this time I would like to stress that this is an informal advisory opin-

ion. Please advise me if a formal opinion becomes necessary.

Sincerely,

/s/ LAIRD

W. Laird Stabler, Jr.
Attorney General

WLSJr:ls

EXHIBIT B

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TRENTON 08625

OFFICE OF THE COMMISSIONER

March 2, 1972

Mr. David R. Keifer
Director of State Planning
Thomas Collins Building
Dover, Delaware

Dear Mr. Keifer:

Under the riparian laws of New Jersey, anyone proposing to alter or build upon lands below mean high tide must have the necessary approval from this Department. It is our policy to consider applications with respect to the degree of true public interest to be served and to the degree of environmental damage to be rendered.

On major proposals such as that apparently contemplated by El Paso Eastern Company we would require a complete environmental impact statement including base line studies before any decision is made. This would apply not only to that part of the proposal situated below mean high tide, but to the entire project.

In this case it is difficult to be more specific as to the status of the case and the probability of our decision, since El Paso has not made any application to this Department and we have no specific knowledge of their proposal.

I agree that it would be useful to communicate on matters of joint interest. You can expect to hear from Richard D. Goodenough, Director of the Division of Marine Ser-

vices whenever an application appears to effect the statutes of both of our States.

Very truly yours,

/s/ RICHARD J. SULLIVAN
Richard J. Sullivan
Commissioner

EXHIBIT C

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
PO BOX 1401
DOVER, DELAWARE 19903

OFFICE OF THE
SECRETARY

November 19, 1990

Richard V. Ciliberti, Vice President
Keystone Cogeneration Systems Inc.
313 Chestnut Street
Philadelphia, PA 19106

Dear Mr. Ciliberti:

Please find enclosed my decision on your Coastal Zone Act status decision application of July 13, 1990.

My decision is that the proposed pier is not a prohibited offshore bulk product transfer facility provided a Coastal Zone Act permit is granted for the Cogeneration plant (including the intake and outfall). Obtaining such a permit is necessary for the pier to qualify for the single industrial use exemption found in the Delaware Coastal Zone Act's definition of bulk product transfer facility.

You have the right to appeal this decision to the state's Coastal Zone Industrial Control Board within fourteen (14) days following the date of the legal notice.

There will be a newspaper legal notice of this decision within a few days of this letter. If no appeal is received within fourteen (14) days following the date of the legal notice, this decision becomes final and you will receive a notice to that effect. Your company will be billed for the legal notice.

If you have any questions about this decision or the appeal process, please call Dennis Brown at 739-5409.

Sincerely,

/s/ EDWIN H. CLARK, II
Edwin H. Clark, II
Secretary

EHC:RHM:bh

FAXED TO:
ERNIE HAUSER
HARDING DRANE, ESQ.
BOB BUCKNAM, JR., ESQ.

CC: JOHN W. GULLIVER ESQ.
DAVE DENISON, P.E.

Coastal Zone Status Decision
CZA Project No. 237SD

THE PROJECT

1. The proposed project is an adjunct to a power generation facility to be constructed in New Jersey. Keystone Cogeneration Systems Inc. proposes to construct a 200 megawatt coal fueled cogeneration facility in Logan Township, Gloucester County, New Jersey, and an 1100 foot pier in the Delaware River. Electric power will be sold to Atlantic City Electric Co. and steam will be sold to neighboring Monsanto Chemical Company (Delaware River Plant).

2. The power generation plant facilities are those normally associated with power plants such as a turbine building, a boiler building, an administration facility, maintenance shop and warehouse building, water treatment building, transformers, cooling tower, pumphouse, tanks, pumps, flue gas desulfurization systems, chimney or stack fly ash silo, switchyard, wastewater systems, and lime and coal storage, and handling systems.

3. The status decision application seeks a ruling on (1) a pier which will extend into the Delaware River, (2) a raw water intake system, consisting of two vertical turbine pumps located on this pier platform, and (3) one wastewater outfall located in the pier area for the discharge of stormwater runoff, treated wastewater, and cooling tower blowdown.

4. The pier will be owned and used by the applicant for the single purpose of offloading coal and lime from vessels docked at the pier and for onloading ash. The applicant acknowledges that no other entity will use the pier for the offloading/onloading of any bulk product and that the coal, lime and ash will be utilized/generated solely by the power plant.

PROJECT HISTORY

5. On December 15, 1988, Sun Refining and Marketing Company applied for a Coastal Zone Act status decision to determine, prior to final sale, whether or not a pier extending from the New Jersey shoreline into the Delaware River beyond the mean low water mark, is regulated by the act.

6. Acting Secretary Hughes' May 5, 1989, status decision stated that the proposed pier is a prohibited offshore bulk product transfer facility in accordance with Section 7003 of the act.

7. On May 17, 1989, the applicant appealed the decision, and a hearing before the Coastal Zone Industrial Control Board was scheduled for June 27, 1989. By stipulation of the parties, dated June 15, 1989, the Secretary's decision was withdrawn and vacated, the hearing was canceled, the applicant withdrew his appeal, and the status decision application was remanded to the Secretary for further consideration of additional information to be provided by the applicant. On September 13, 1990, the applicant supplemented its application with additional information, and the review process was reinstituted.

LEGAL FINDINGS

8. The pier constitutes a prohibited bulk product transfer facility, unless it will serve a single industrial or manufacturing facility for which a permit is granted by the Department.

9. The plant, including the intake and the outfalls, is a manufacturing facility which could receive a coastal zone permit from the Department if it satisfies the requirements of 7 Del. C. Section 7004.

ORDER

10. The Department hereby grants applicant a conditional coastal zone status decision that the pier does not constitute a prohibited bulk product transfer facility.

11. This status decision is expressly conditioned on the applicant eventually receiving a coastal zone permit for the plant. The failure to procure such permit for the plant will render applicant's conditional coastal zone status decision null and void.

12. The Department has the further understanding regarding the Department's future coastal zone permit decision for the plant:

(a) That any Department permit encompass the entirety of the plant, not only the coastal zone components; and

(b) That the Department will consider the plant's impact on the coastal zone only for the purpose of rendering its coastal zone permit decision.

/s/ EDWIN H. CLARK, II
Edwin H. Clark, II
Secretary

Date:

EXHIBIT D

[Company Logo omitted]

Golder Associates Inc.

1951 Old Cuthbert Road, Suite 301
Cherry Hill, NJ 08034
Telephone (856) 616-8166
Fax (856) 616-1874

September 27, 2004

Project No. 043-6313
via Federal Express

Department of Natural Resources and
Environmental Control
Division of Water Resources
Wetlands and Subaqueous Lands Section
89 Kings Highway
Dover, DE 19901

RE: Permit Application
Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects – Delaware River Geotechnical Borings and Cone Penetrometer Tests

Ladies and Gentlemen:

Golder Associates Inc. (Golder) is submitting this permit application for Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects for review and approval by the Delaware Department of Natural Resources and Environmental Control, Division of Water Resources, Wetlands and Subaqueous Lands Section. This permit application has been prepared by Golder for a water-based survey investigation program consisting of cone penetrometer tests (CPTs) and geotechnical borings within the Delaware River. The Site lies just offshore from the Logan Electric Co-Generation Plant in Logan Township, Gloucester County, New Jersey. However, the

proposed borings and CPTs are all located within Delaware State boundaries.

This application is being submitted pursuant to a telephone conversation between Ms. Laura Herr of the Wetlands and Subaqueous Lands Section and Mr. Michael Hart of Golder on September 16, 2004. Although Nationwide Permit No. 6 permits such survey activities with the river, Ms. Herr indicated that approval from the Wetlands and Subaqueous Lands Section would also be required prior to the start of work. Ms. Herr indicated that there were no specific permit appendices that pertain specifically to the survey activities proposed, and therefore instructed Golder to use only the basic application form and answer all questions that were pertinent to the survey activities that will actually be performed. In addition to the application form, Golder was instructed to provide a detailed description of the work being performed as well as a plan of the site and boring and CPT locations. As such, the following paragraphs provide greater detail about the survey investigation program; Attachment 1 contains the completed basic permit application form; and, a plan of boring and CPT locations is provided as Attachment 2.

The purpose of this survey investigation is to gather information for the design of a receiving terminal to support the proposed liquefied natural gas (LNG) storage facility in Logan Township, New Jersey. Information from this investigation will be used for pier and bulkhead design, deepening for vessel berthing, and other ancillary features typical of such terminals. The survey investigation program will consist of fourteen (14) CPTs and five (5) geotechnical borings performed using barge-mounted investigation equipment within the Delaware River. As shown on the plan (Attachment 2) the boring and CPT locations lie outside of the navigable channel and anchorage limit and within the boundaries of the State of Delaware.

The investigation equipment will consist of geotechnical drill rig mounted to an approximately 30'x90' barge with a four-point anchoring system to keep position over the boring/CPT location. A tug boat will be used to position the barge over the boring/CPT locations and will also serve as a transport vessel for the drilling crew and observation personnel. All personnel working on the barge will depart from a docking facility on the New Jersey shore of the Delaware River each day. The sampling barge will remain in the river until the completion of the project. Both the sampling barge and tug boat conform to all necessary safety standards and the U.S. Coast Guard has been contacted and made aware of proposed project.

Borings will be advanced using mud-rotary drilling methods and samples will be collected via split-spoon sampler in general accordance with the American Society for Testing and Materials (ASTM) Standard Method D1586, and by direct-push Shelby tube in general accordance with ASTM D1587. In-situ vane shear testing (ASTM D2573) will also be performed within some of the borings. Where necessary to determine bedrock type, quality, and competency, diamond core drilling with an NX-size core barrel will be performed in accordance with ASTM D2113 to obtain samples of bedrock. Upon completion of each boring, the drilling rods, sampling equipment, and casing will be removed and the borehole tremie grouted to the mudline. Drill cuttings and drilling mud will be deposited upon the river bottom.

Cone penetrometer testing will be performed using an electronic piezocone. The CPTs will be advanced through the water column via casing set into the mudline and then by direct-push in accordance with ASTM D5778. The small diameter hole created during cone penetrometer testing typically closes upon cone extraction so grouting is not envisioned.

In addition to Ms. Herr, Ms. Susan Love from the Delaware Coastal Programs and Mr. Kevin Dougherty from

the U.S. Army Corps of Engineers were also contacted regarding permitting. Both agencies indicated that they did not require any additional permitting for the proposed project.

This letter has attempted to provide the necessary information which is not included on the permit application in order to assist with the processing of this application. The anticipated commencement date for the survey investigation program is Monday, October 4, 2004. It is estimated that the program will require 3 to 4 weeks to complete. Therefore, time is of the essence and we respectfully request that the Wetlands and Subaqueous Lands Section expedite its review.

If there are any questions regarding this permit application please do not hesitate to contact either of the undersigned.

Very truly yours,

GOLDER ASSOCIATES INC.

/s/	ROBERT S. VALORIO	/s/	MICHAEL F. HART
	Robert S. Valorio, P.E.		Michael F. Hart
	Senior Project Engineer		Project Engineer

Attachments

cc: R. Stetkar, Golder Associates Inc.

Last Revised on: July 17, 2003

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Wetlands and Subaqueous Lands Section Basic Application Form

ATTACHMENT 1

24a

Section 1: Applicant Identification

1. Applicant's Name: BP Gateway Landing, LLC
Mailing Address: 501 West Lake Park Blvd.
Houston, TX 77079
Telephone #: (281) 366-5876
Fax #: (281) 366-3436
E:mail: bcpole@bp.com

2. Consultant's Name: Golder Associates Inc.
Mailing Address: 1951 Old Cuthbert Rd
Cherry Hill, NJ 08034
Suite 302
Telephone#: (856) 616-8166
Fax #: (856) 616-1874
E:mail:

3. Contractor's Name: Wagon Gauge Inc.
Mailing Address: P.O. Box 413
Foot of Jersey Ave.
Jersey City, NJ 07303
Telephone #: (201) 433-9271
Fax #: (201) 433-9139
E:mail:

Section 2: Project Description

4. Is the project:
A new project or an addition to an existing project? ✓ Repair or Replacement of an Existing Structure? ☐
Both? ☐

5. Check each Appendix that is enclosed with this application:

☐A. Boat Docking Facilities	☐G. Bulkheads	☐N. Preliminary Marina Checklist
☐B. Boat Ramps	☐H. Fill	☐O Marinas
☐C. Road Crossings	☐I. Rip-Rap	☐P. Stormwater Management
☐D. Channel Modifications/Dams	☐J. Vegetative Stabilization	☐Q. Ponds and Impoundments
☐E. Utility Crossings	☐K. Jetties,Groins,Breakwaters	☐R. Maintenance Dredging
☐F. Intake or Outfall Structures	☐M. Projects in Wetlands	☐S. New Dredging ✓

Section 3: Project Location

6. Project Site Address: NA
Site located on the Delaware River
Name of site owner: NA
(if other than applicant)
County: N.C.☐ Kent☐ Sussex☐

7. Driving directions from the nearest intersection of two State roads: NA
(Attach a location road map with the site indicated on the map).

8. Tax Parcel Number: NA Subdivision Name: NA

WSLS Use Only:
Type of Auth: SP ✓ SL☐ WE☐ WQ☐ SA☐ SU☐ LA☐ MP☐ WA☐ EX☐
Permit #s:
SPGP: 18☐ 20☐ Individual Permit:☐ Nationwide Permit #:
Received Date: Project Scientist:
Fee Received? Yes☐ No☐ Amt: $$ Receipt #:
Public Notice #: 24 Public Notice Dates: ON 10/13/04 OFF 11/2/04

Last Revised on: July 17, 2003

Section 3: Project Location (Continued)

9. Name of Waterbody at Project Location: Delaware River
Waterbody is a Tributary to: N/A

10. Is the waterbody: (Tidal) Non-tidal

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SEP 28 2004
WETLANDS

11. Is the project:
On public subaqueous lands? ✓ On private subaqueous lands? In wetlands?

If the project is on private subaqueous lands, indicate the name of the subaqueous lands owner:

(Written permission of the private subaqueous lands owner must be included with this application).

12. Present Zoning is: Agricultural Residential Commercial Industrial Other ✓

Section 4: Miscellaneous

13.A. List the name and complete mailing address of the immediately adjoining property owners on all sides of the project. (Attach additional sheets as necessary):

N/A

B. For wetlands and marina projects, list the name and complete mailing address of each property owner within a 1000 foot radius of the project. (Attach additional as necessary)

NA

14. Provide a brief description of the project purpose:

The project will consist of geotechnical borings and CPTs advanced in the Delaware River for use in designing port structures

15.A. Indicate the names of all representatives from the Department and the Army Corps of Engineers who you have discussed the project with:

Susan Love — Delaware Coastal Programs
Laura Herr — Department of Wildlife Management
Kevin Dougherty — Army Corps of Engineers

B. Have you had a State Jurisdictional Determination performed on the property? Yes (No)
C. Has the project been reviewed in a monthly Joint Permit Processing Meeting? Yes (No)
If yes, what was the date of the meeting?

16. Have you applied for or obtained any previous authorizations from the WSLS for projects at this site, or is there a current subaqueous lands lease for any fill or structures on public underwater land? Yes (No)
If yes, what permit or lease number(s) were assigned?

17. Have you applied for or obtained a federal permit for the project from the Army Corps of Engineers?
Applied? Yes (No) If yes,
Type of permit applied for:
Date application was submitted:
Federal Identification # Assigned:
Obtained? Yes No
Federal Permit #:
Date Issued:

This work is permitted under Nation Wide Permit #6.

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SEP 28 2004
NJ DEP BUREAU

Section 5: Signature Page

18. **Agent Authorization**:
If you elect to complete this agent authorization section, all future correspondence to the Department may be signed by the duly authorized agent. In addition, the agent will become the primary point of contact for all correspondence from the Department.

I do not wish to authorize an agent to act on my behalf. [ ]

I wish to authorize an agent as indicated below. [ ]

I, Lauren Segal BP Crowleaton LLC, hereby designate and authorize
Name of Applicant
Golder Associates Inc to act on my behalf in the processing
Name of Agent
of this application and to furnish any information that is requested by the Department.

Applicant's Signature _____ Date 9/24/04

Authorized Agent's Name: Golder Associates Inc.
Mailing Address: 1951 Old Cuthbert Rd
Cherry Hill, New Jersey 08034
Suite 301

Telephone #: (856) 616-8166
Fax #: (856) 616-1824
E-mail: _____

I hereby certify that the information on this form and on the attached plans is true and accurate to the best of my knowledge. I understand that the Department may request information in addition to that set forth herein if deemed necessary to appropriately consider this application.

Agent's Signature Pete Swinick Date 9/27/04

19. **Applicant's Signature**:

I hereby certify that the information on this form and on the attached plans is true and accurate to the best of my knowledge. I understand that the Department may request information in addition to that set forth herein if deemed necessary to appropriately consider this application. I grant permission to the authorized Department representative(s) to enter upon the premises for inspection purposes during working hours.

Applicant's Signature _____ Date 9/24/04

Co-Applicant _____ Date _____

Lauren Segal
Segal

EXHIBIT E

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DIVISION OF WATER RESOURCES
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Wetlands and Subaqueous
Lands Section

October 29, 2004

Lauren Segal
BP Crown Landing, LLC
501 West Lake Park Blvd
Houston, TX 77079

RE: Subaqueous Lands Permit Application No. SP-389/04 for BP Crown Landing, LLC

Dear Ms. Segal:

After reviewing the above-referenced permit application and considering public comments received during the public notice process, we have determined that we cannot make a decision on your application until a determination has been made regarding whether construction of an LNG storage facility is an activity permissible in Delaware's coastal zone.

Accordingly, we are requesting that you withdraw your subaqueous lands permit application to perform 19 geotechnical test borings until the conclusion of the coastal zone status decision process. If the proposed LNG storage and transfer activities are determined to be ones that are permissible in the coastal zone, the application for the test borings can be re-submitted at that time.

If you should have any questions regarding this matter, please feel free to contact me at 302/739-4691.

Sincerely,

/s/ LAURA M. HERR
Laura M. Herr
Program Manager
Wetlands and Subaqueous Lands Section

cc: Pete Swinick, Golder Associates, Inc.
John A. Hughes, Secretary, DNREC
Kevin C. Donnelly, Director, Division of Water Resources

EXHIBIT F

[Company Logo omitted]

Golder Associates Inc.

1951 Old Cuthbert Road, Suite 301
Cherry Hill, NJ 08034
Telephone (856) 616-8166
Fax (856) 616-1874
www.golder.com

November 4, 2004

Project 043-6313
Via Facsimile and Federal Express

Department of Natural Resources and Environmental Control
Division of Water Resources
Wetlands and Subaqueous Land Section
89 Kings Highway
Dover, DE 19901

RE: Permit Application
Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects – Delaware River Geotechnical Borings and Cone Penetrometer Tests

Ladies and Gentlemen:

Golder Associates Inc. (Golder) submitted the referenced permit application for Subaqueous Lands, Wetlands, Marina and Water Quality Certification Projects for review and approval by the Delaware Department of Natural Resources and Environmental Control, Division of Water Resources, Wetlands and Subaqueous Lands Section (DNREC) on September 27, 2004. Golder respectfully withdraws the referenced application for a Subaqueous Permit at this time.

Golder's withdrawal of the referenced permit application is made without prejudice to any future filing for this application or any other application before DNREC or any other agency of the State of Delaware by Golder, Crown Landing LLC or any of their respective affiliates (collectively "Applicant Group"). Furthermore, Golder withdraws the referenced permit application without waiver of any right that any member of Applicant Group may or may not have or position that any member of Applicant Group may or may not assert in connection with such a prospective filing.

If there are any questions regarding this permit application withdrawal please do not hesitate to contact me.

Very truly yours,

GOLDER ASSOCIATES INC.

/s/ ROBERT E. STETKAR
Robert E. Stetkar, P.E.
Geotechnical Practice Leader & Principal

RES/res
G:\PROJECTS\043-6313\110304ltr.DOC

Cc: Lauren Segal, BP America

DNREC Requests BP Withdraw Subaqueous Lands Permit Application – BP Agrees

Department of Natural Resources and Environmental Control Secretary John A. Hughes today announced that the agency has requested that British Petroleum (BP) withdraw its subaqueous lands permit application in support of the Liquefied Natural Gas (LNG) terminal proposed for Logan Township, New Jersey. **In response, BP has withdrawn its application in a letter to DNREC dated Nov. 4.**

DNREC notified BP by letter that the Department must await **the company's** application for a Delaware Coastal Zone status decision, and a determination from the Secretary on how the facility is to be treated under Delaware's Coastal Zone Act prior to acting on the subaqueous lands permit application. BP had recently filed an application seeking permission to conduct structural subsurface borings in the river bottom.

BP's proposal to construct an LNG terminal along the banks of the Delaware River are contingent on receipt of permitting approvals from DNNEC, as well as New Jersey and the Federal Energy Regulatory Commission (FERC). DNREC ~~has~~ previously informed BP that a coastal zone status decision should be the first application it should submit to DNREC. BP has informed DNREC that an application is forthcoming. In the meantime, a subaqueous lands permit application for test borings in the river bottom were the subject of a public notice published Oct. 13. DNREC ~~had~~ received several requests for a public hearing on the application.

Delaware's Coastal Zone Act excludes new heavy industries and bulk product transfer facilities from Delaware's coastal zone. While BP's proposed facility is in New Jersey, the pier necessary for off loading of ships would extend into the Delaware River and over Delaware-

owned public subaqueous lands. The status decision process under the Regulations Governing Delaware's Coastal Zone offers applicants a process for obtaining a ruling from the Secretary of DNREC as to how any proposed facility might be addressed under the Act.

"We can't determine the outcome of the status decision process without an application and supporting materials from the applicant. As soon as the application comes in, we'll process it and make a determination," said Secretary Hughes.

BP's application will be made available for public review as part of the status decision process.

EXHIBIT G

LEGAL NOTICE

COASTAL ZONE ACT STATUS DECISION

Re: Crown Landing LLC

Under the authority of the Delaware Coastal Zone Act (7 Del. Code, Ch. 70) and the "Regulations Governing Delaware's Coastal Zone", the Secretary of the Department of Natural Resources and Environmental Control (DNREC) has rendered a decision on a Request for a Coastal Zone Act Status Decision application from Crown Landing LLC. The company sought the status decision to ascertain if a new pier facility to transfer liquefied natural gas (LNG) from ships in the Delaware River to storage tanks in New Jersey is allowable under the Coastal Zone Act.

The proposed facility would occupy 19 acres in the Delaware River for a 2000 foot pier with one ship berth. The pier could accommodate LNG carriers from 138,000 cubic meters to 200,000 cubic meters in capacity. The pier would have one 44-inch diameter liquid unloading line to the storage tanks. The pier would convey the LNG to storage tanks on land in Logan Township, New Jersey where existing gas pipelines will convey the gas to customers in the region.

The Secretary's decision on this application is that the proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, the Secretary has found that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the Secretary has determined that the on-shore storage tanks essential to the operation of the facility are prohibited structures.

There is a fourteen day appeal period following the date of publication of this legal notice. Anyone desiring to appeal this decision to the State Coastal Zone Industrial Control Board must do so within the appeal period. There is a one-hundred dollar appeal fee. An appeal application may be acquired by calling Dennis Brown at 739-3091. If no appeal is received, this decision becomes final.

/s/ JOHN A. HUGHES
John A. Hughes, Secretary Date 2/3/05

INSTRUCTIONS:

1. Please publish as a legal notice ASAP
2. Send bill and affidavit to: Dennis Brown
DNREC
89 Kings Highway
Dover, DE 19901
Ph. No. 739-3091
Billing Code: SD0240

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

February 3, 2005

CERTIFIED MAIL
Return Receipt Requested

Ms. Lauren Segal
Vice President
Crown Landing LLC
501 West Lake Park Blvd.
Houston, TX 77079

Re: Coastal Zone Act Status Decision

Dear Ms. Segal:

Based on the public comments, the assessment and recommendations of DNREC staff, and discussions with our legal representatives, I have reached a decision on your application for a coastal zone status request.

I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore storage tanks essential to the operation of the facility are prohibited structures.

This decision does not come without some appreciation of the need for additional natural gas supplies in this country nor the relative cleanliness of natural gas compared to other energy fuels. Despite the benefits that increased LNG imports might bring, placement of this facil-

ity within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware's coastal zone.

There is a fourteen-day appeal period following the publication of the enclosed legal notice announcement of this decision. If you wish to appeal this decision to the State Coastal Zone Industrial Control Board, please call Dennis Brown at 302-739-3091 for an appeal form. There is a one-hundred dollar appeal fee. If no appeal is received within the appeal period, this decision becomes final.

Sincerely,

/s/ JOHN A. HUGHES
John A. Hughes
Secretary

pc: Dennis Brown
David S. Swayze
Michael W. Teichman

Enclosure

MEMORANDUM

TO: John Hughes

THRU: David Small

FROM: Philip Cherry
Dennis Brown

DATE: February 2, 2005

RE: BP/Crown Landing Status Decision
Assessment and Recommendations

Please consider this memorandum as our assessment of the BP - Crown Landing LLC status decision application. We have carefully considered the application and supporting legal memorandum, consulted with the Attorney General's Office and reviewed all of the comments received from the public in preparing this assessment. Copies of all public comments are attached hereto as an addendum to this report.

The status decision application from Crown Landing LLC was received on December 7, 2004 and deemed administratively complete with publication of the required legal notice on January 9, 2005. The required 10 day comment period concluded on January 24 and, under the regulations, you have until February 15, 2005 to make a decision.

It should be noted in this assessment that this proposed project could bring significant benefits to Delaware. Natural gas is a welcome alternative to dirtier sources of energy, is needed along the eastern seaboard to maintain reliable and cost competitive supplies and can be a significant help in easing this country's reliance on imported oil. LNG imports will likely figure prominently in meeting the nation's needs for additional energy and this is one of many such proposals across the country. This industry

also has an overall impressive safety record and decades of experience in moving and utilizing LNG.

The question before you, however, is not the relative benefits of natural gas, but an even more straightforward one. Is the LNG pier a bulk product transfer facility under the Coastal Zone Act (and prohibited) or can it be exempted under the Act as "... a pier for a single industrial or manufacturing facility for which a permit is granted or which is a non-conforming use."? After careful consideration of the application, we offer the following thoughts in support of a determination that the facility is prohibited under the Act.

1. There seems to be no argument that the movement of LNG from a ship to shore would be considered a bulk product transfer, absent any argument for the single use industrial exemption. It would appear this is exactly the type of activity that is the subject of the CZA – and the prohibition – in the first place.

2. The single use bulk product transfer exemption was intended to accommodate either one of two scenarios – neither of which applies in the BP case. The first is a situation where an existing grandfathered use might want to wharf out over the river to accommodate its existing industrial or manufacturing use at some point in time following passage of the Act. This clearly doesn't apply in the BP case. The second situation was intended to apply to new manufacturing uses proposed within the zone which might take advantage of Section 7004 (a) which states in part "... manufacturing uses not in existence and in active use on June 28, 1971 are allowed in the Coastal Zone by permit only". The phrase "by permit only" means, in our view, a coastal zone permit issued to a manufacturing facility regulated un-

der the Act. The BP facility cannot be granted a permit under the exemption for a bulk product transfer facility because, simply considered on its merits, this LNG terminal is a bulk product transfer facility, not a manufacturing use.

3. The manufacturing label that the applicant wishes to place upon itself (in order to enjoy the bulk product facility exemption) doesn't apply, in our opinion, for two reasons:

   - It doesn't meet the definition of "manufacturing" which reads in part ". . . the mechanical or chemical transformation or organic or inorganic substances into new products . . ." The LNG is a result of pumping natural gas out of the ground at another location, and super cooling it to establish a liquid, making it economical to transport. Regassifying the LNG and adding nitrogen and an odorizer do not, in our opinion, meet the manufacturing test. BP is simply returning the substance to its natural state (with slight modification), not manufacturing it.

   - The US Department of Commerce, Bureau of the Census classifies LNG terminals under the new 2002 North American Industry Classification System (NAICS). The classification code for an establishment storing natural gas, including liquefied natural gas, is 486210, Pipeline Transportation of Natural Gas. The classification of an establishment re-gasifying LNG is the same, Pipeline Transportation of Natural Gas. These codes are not within the NAICS manufacturing designations. Similar results are found under the old SIC code designations.

4. The application suggests an analogous situation with the single use pier allowed for the Logan generating station adjacent to the proposed LNG terminal. In that instance, the Secretary issued a coastal zone permit for the Logan facility under a finding that the generation of power from the burning and consumption of the coal in that process is "manufacturing". Logically then, the pier, to be situated in the Delaware River met the bulk product transfer exemption. For the reasons stated above, the situation found in the BP application is not similar to the Logan station matter and the comparison cannot be applied. In our opinion, BP outlines a process for re-gasification of the LNG, not the manufacture of LNG.

5. The question as to whether this facility as proposed, is a heavy industry is raised in this application and an analysis of whether this facility meets that definition is appropriate. The applicant goes to some length to explain away any possibility that this proposed facility could be considered a heavy industry. The application requires us to analyze the on-shore facility and ascertain whether characteristics found in the definition of "heavy industry use" are sufficiently present in the application to make a definitive determination.

   The starting point for this analysis begins again with a definition of "manufacturing use."

   "Manufacturing" means the mechanical or chemical transformation of organic or inorganic substances into new products characteristically using power-driven machines and materials handling equipment, and including establishments engaged in assembling component parts of manufactured products, provided

the new product is not a structure or fixed improvement.

By its definition, manufacturing use is a process by which new products are produced and is allowable by permit in the Coastal Zone. However, a heavy industry, to be so classified, does not need to qualify under the manufacturing definition as part of the Department's analysis.

The analysis required to determine whether a use is a heavy industry is entirely different, and starts with a careful review of the definition:

"Heavy Industry Use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equip-

ment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

Found within Crown Landing's Application are representations that certain of the characteristics in the "heavy industry" definition will be employed at the facility. These characteristics include (1) a smokestack, (2) a distillation tower, (3) three tanks; a small tank farm is present and (4) it is contended that there will be chemical processing equipment. Additionally this facility will utilize approximately forty acres of land and about nineteen acres of Delaware River bed, excluding on-shore buffers and exclusive zones. This clearly utilizes more than the twenty (20) acre threshold discussed in the "heavy industry use" definition. If one looks at this facility in conjunction with the definition of "heavy industry use" on a characteristic basis (as opposed to a process based analysis found in the "manufacturing" definition) one can easily conclude the upland facility represents a new heavy industry use.

6. Another issue for your consideration entails further review of the definition of "Heavy Industry Use". After listing examples of what the General Assembly believed clearly qualified as a heavy industry use the definition goes on to include generic examples not included in a heavy industry use. These examples describe what the Legislature deemed to be the process employed in classic

manufacturing and other on-shore facilities as well as those appurtenances to the facility "provided, however, that on-shore facilities shall not include tank farms or storage tanks."

Crown Landing, LLC's Application clearly establishes that a small tank farm will be present on the proposed site. It may be argued that there is no "tank farm" but the tanks described in the application certainly will be used for on-shore storage. This contradicts the Applicant's position that the upland facility is consistent with the Coastal Zone Act. Uses to be established in the Coastal Zone by permit, or those exempted by the Act, must be those facilities not encompassing a tank farm or on-shore storage tanks as set forth in the Act.

7. Another element to be considered under the heavy industry question is the facility's "potential to pollute when equipment malfunctions or human error occurs". The application addresses this issue by suggesting that in the event of a spill there is no potential to pollute, other than temporary thermal alteration of Delaware River water. It might be argued that a spill of LNG on lands adjacent to the River and pier might be considered pollution (destroying flora or fauna through asphyxiation or temperature effects), as might the dissipation of methane (a potent greenhouse gas). Were the boiled off methane to ignite, clearly the potential to pollute would be significant, considering the byproducts of combustion.

8. We've also investigated how the four other facilities around the country are classified under applicable land use and zoning laws. Obviously, Delaware's Coastal Zone Act is a unique one and the manufacturing vs. bulk product transfer

question is similarly unique to Delaware, so no comparison to other states can be made concerning that question. It is interesting to note, however, that while the Cove Point facility is located in an area zoned "light industrial" (as highlighted in the application) both the Elba Island, Georgia and Lake Charles, Louisiana facilities are located in areas zoned for heavy industry. The Everett, Massachusetts facility is zoned Industrial.

9. The application cites several instances where previous status determinations have been made that certain activities were governed under the Act, primarily due to a Delaware Supreme Court ruling in 1992 that the Act should be "construed liberally to effectuate its purposes". In those instances, liberally construing the Act resulted in debatable activities being regulated under the Act. In the present case, the applicant is arguing for a liberal construction of the Act to ease the burden of regulation upon an applicant, in direct contrast to the purpose of the Act which was to "prohibit . . . new heavy industry . . . and control industrial development . . . ." A liberal construction of the Act ("to effectuate its purposes") in this case would be to determine the activity to be a bulk product transfer facility and hence prohibited, not to classify the land based portion of the facility to be manufacturing so the pier could be exempted.

10. This application has generated a large amount of public commentary. Over 200 pieces of correspondence and/or telephone calls have been received, with all but one being opposed to the project.

The foregoing are our views on the application and the question before you. We have not considered the safety or

environmental aspects of this project in this review because they are premature in the context of a status decision application. Should this project be deemed permittable, those issues should be carefully considered, as called for in the Act.

Cc: Keith Trostle

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

January 5, 2005

Ms. Lauren Segal
Vice President
Crown Landing LLC
501 West Lake Park Blvd.
Houston, TX 77079

Re: Delaware Coastal Zone Act Status Decision
Application

Dear Ms. Segal:

This letter is to inform you that your Request for a Coastal Zone Act Status Decision is administratively complete. The application is signed, dated and all the applicable questions have been addressed sufficiently so as to allow the public an opportunity to examine and comment on your application. This does not preclude the Department from requesting additional information or data regarding this application.

There will be a legal notice in two local newspapers announcing the opening of the 10 business day comment period. I have enclosed a copy of that notice for your files. Please call me at 302-739-3091 if you wish to discuss this.

Sincerely,

/s/ JOHN A. HUGHES
John A. Hughes
Secretary

Cc: David S. Swazy
Keith Trostle, DAG
Dennis Brown

Enclosure

BP-Crown admin-complete let

Brown Dennis E. (DNREC)

From: Mike Teichman [mteichman@pgslegal.com]
Sent: Wednesday, January 19, 2005 6:08 PM
To: Brown Dennis E. (DNREC)
Cc: Dave Swayze
Subject: BP -- Crown Landing

Dear Dennis:

Pursuant to our telephone conference earlier this week, please consider this e-mail as the request of this firm, pursuant to Delaware's Freedom of information Act, 29 Del. C. Ch. 100, to obtain copies of all public comment received by the Department of Natural Resources and Environmental Control in response to the recent publication of the Status Decision Request of Crown Landing LLC under the Coastal Zone Act. This request would include all written comments received from the date of publication through January 24, 2005.

We are prepared, of course, to bear all reasonable costs of the Department in making copies of these documents. Alternatively, we can arrange for a representative of this firm to make such copies at your location.

I look forward to hearing from you. Thanks for your cooperation.

Regards,

Michael W. Teichman, Esq.
Parkowski Guerke & Swayze, P.A.
800 King Street, Suite 203
Wilmington, DE 19801
Tel: 302.594.3331
Fax: 302.654.3033
E-mail: mteichman@pgslegal.com

New Castle Weekly

203 Delaware Street, New Castle, DE 19720-4815
328-6006

AFFIDAVIT OF PUBLICATIO

STATE OF DELAWARE
COUNTY OF NEW CASTLE

Personally appeared before me this 13th day

LEGAL NOTICE

Receipt of a Request for a Coastal Zone Act Status Decision

Re: BP; Crown Landing, LLC

The Department of Natural Resources and Environmental Control (DNREC) has received a request for a Coastal Zone Act Status Decision from Crown Landing, LLC, a subsidiary of BP. The applicant is seeking a status decision to determine the applicability of the Coastal Zone Act to their plans to construct and utilize a liquefied natural gas (LNG) docking facility in the Delaware River in Logan Township, New Jersey. The proposed docking facility is planned to be 2,000 feet long and have one berth. The docking facility will be able to receive one or two ships per week. Each LNG ship would carry from 138,000 to 2000,000 cubic meters of LNG.

The application is on public display at the DNREC offices at 89 Kings Highway in Dover and 715 Grantham Lane south of New Castle, the Hockessin Public Library and the Delaware City Public Library. The public is invited to review the application and send comments to the DNREC, 89 Kings Highway, Dover, DE 19901, attention Dennis Brown. All comments should be at the DNREC by close of business on January 25, 2005. Afterwards, the DNREC Secretary will make a decision on this application and notify the public.

1/12

Mimi Carpenter of the *New Castle Weekly*, a weekly newspaper published in the City of New Castle, County of New Castle, State of Delaware, who being duly sworn, states that the attached advertisement of Receipt of a Request for a Coastal Zone Act Status Decision Re: BP; Crown Landing LLC

was published in the *New Castle Weekly* on 1/12/05

Mimi Carpenter, Publisher

Sworn to before me this 13th day of Jan. 2005

Earl J. Carpenter Jr.

EARL J. CARPENTER, JR.
NOTARY PUBLIC
STATE OF DELAWARE
My commission expires Sept. 25, 2008

Mailing:
The News Journal
PO Box 15505
Wilmington, DE 19850

Street
The News Journal
950 W. Basin Road
New Castle, DE 19720
(302) 324-2500

Sunday News Journal
The News Journal

50a

The News Journal

AFFIDAVIT OF PUBLICATION

STATE OF DELAWARE COUNTY OF NEW CASTLE

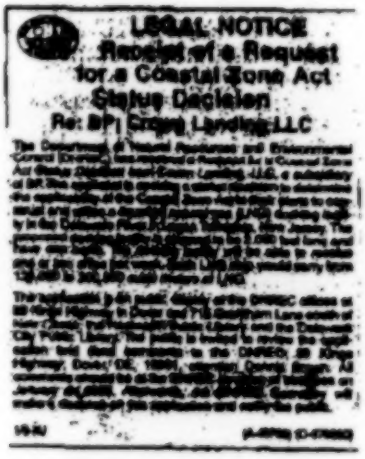
Personally appeared before me this 9th day of January, 2005:

I, Melissa Michelson, of the NEWS JOURNAL COMPANY, a daily newspaper printed and published in the County of New Castle, State of Delaware, who, being duly sworn states that the advertisement of S/D Coastal Zone-BP Crown Landing Refining was published in *THE NEWS JOURNAL* on n/a, and/or THE SUNDAY NEWS JOURNAL on January 9, 2005.

Melissa Michelson — Legal Coordinator
Name Title

Sworn to before me this 9th day of January, 2005.

Elizabeth A Bobeck
Notary Public



LEGAL NOTICE
Receipt of a Request
for a Coastal Zone Act
Status Decision
Re: BP Crown Landing LLC

EXHIBIT H

BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD OF THE STATE OF DELAWARE

APPEAL NO. CZ 2005-01

IN THE MATTER OF COASTAL ZONE STATUS DECISION ON THE APPLICATION OF Crown Landing LLC

DECISION AND ORDER

Pursuant to notice, a public hearing was held on March 30, 2005, in the Conference Center of Delaware Technical & Community College, Stanton Campus, Newark, Delaware, concerning the appeal filed on February 15, 2005, by Crown Landing LLC and the appeal filed on February 18, 2005, by *pro se* appellants John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty of a status decision of the Secretary of the Department of Natural Resources and Environmental Control issued February 3, 2005. Members of the Coastal Zone Industrial Control Board ("the Board") present were: Christine M. Waisanen, Chair, John Allen, Paul Bell, Albert Holmes, Pallather Subramanian and Victor Singer. Absent was Robert D. Welsh. John S. Burton and Judy McKinney-Cherry were disqualified from consideration of the matter. Phebe S. Young, Deputy Attorney General, represented the Board.

Crown Landing LLC was represented by David S. Swayze, Esq., and Michael W. Teichman, Esq., of Parkowski, Guerke & Swayze.

Collins J. Seitz, Jr., Esq. and Matthew Boyer, Esq., of Connolly Bove Lodge and Hutz LLP and Kevin Maloney, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC") and DNREC Secretary John Hughes ("the Secretary").

PRELIMINARY MATTERS

On March 8, 2005 and March 9, 2005 respectively, Crown Landing LLC and DNREC filed motions to dismiss the appeals of John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty. The controlling statute, 7 *Del. C.* § 7007(b) provides that, "Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under subsection (a) of § 7005 of this title may appeal same under this section." The disputed appeals favor the Secretary's status decision but include assertions that the *pro se* appellants are nevertheless "aggrieved" by the Secretary's failure to impose fines pursuant to 7 *Del. C.* § 7011 for activities the *pro se* appellants allege the applicant has undertaken without a required permit. Additionally, the disputed appeals include the assertion that, "The DNREC under John Hughes has consistently failed to defend CZA decisions at the judicial level, and have (sic) demonstrated an alarming incompetence and lack of understanding of CZA issues, including failing to appeal a clearly erroneous decision rendered by the CZICB in regard to the Delaware Terminal Company, issued February 12, 2004; and the recent illegally negotiated settlement with the Premcor Refinery, issued January 25, 2005."

The Board determined that the *pro se* appellants were not "aggrieved" by the Secretary's decision within the meaning of the statute. By a vote of 5-0 with the Chair abstaining, the Board granted the motions to dismiss.

On March 16, 2005, the Delaware Chapter of Sierra Club, Delaware Chapter of the Audubon Society and Delaware Nature Society filed a joint Motion to Intervene together with a Motion for the Admission *Pro Hac Vice* of Kenneth T. Kristl, Esq., to represent them in this matter. On March 17, 2005, John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty filed a Motion to Intervene.

The Board granted the Motion to Admit Mr. Krystl *pro hac vice*.

All proposed interveners conceded that permission to intervene is discretionary with the Board. Mr. Krystl argued, on behalf of his clients, that their intervention is necessary in order to preserve their right meaningfully to appeal a decision of the Board to the Superior Court because any Superior Court appeal is on the record. The Board determined that an adequate record would be created by the existing parties together with any statements and positions the proposed interveners might choose to make as members of the public. By a vote of 5-0, with the Chair abstaining, both motions to intervene were denied.

SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

Before the hearing, the Board had reviewed the record of proceedings below including Crown Landing LLC's Request for a Coastal Zone Status Decision with supporting factual and legal arguments, voluminous public comments, the Assessment and Recommendations of DNREC staff and the Decision dated February 3, 2005, from which the appeal is taken. The application seeks a status decision for a proposed new waterfront gasification facility for receiving and processing of liquefied natural gas (LNG). The proposed construction comprises a docking facility with an approximately 2,000-foot-long trestle pier providing a single berth designed to accommodate ships carrying LNG and a gasification plant located on land. The majority of the pier would be located within the State of Delaware, inside the coastal zone, and the remainder of the construction would be in the State of New Jersey. The application for a status decision and the status decision itself relate only to that portion of the proposed construction located in Delaware. The Secretary's decision that the proposed facility is prohibited by the Coastal Zone Act includes his rationale:

I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore tanks essential to the operation of the facility are prohibited structures.

The following witnesses were called by Crown Landing:

1. Lauren Segal, the Project Director for the Crown Landing project. Ms. Segal described the overall process of producing usable natural gas. The gas, which could come from wells virtually anywhere in the world, is chilled to liquid phase prior to being loaded onto ships which transport it to facilities such as the one proposed in this matter. Many contaminants of the gas are eliminated by the chilling process. At the proposed docking facility, the chilled liquid would be off-loaded and transferred through cryogenic pipes to tanks located on shore. Within the tanks, the liquid would be circulated. Also on shore, it would be diluted by the addition of small amounts of nitrogen if necessary to adjust the BTU content. The liquid then would be heated to gaseous phase and then pressurized before being transferred to transport pipelines. A small amount of odorizing substance, Mercaptan, necessary for safety, would be added before the gas is transported through the outgoing pipelines. Ms. Segal considers the process occurring after the LNG is removed from the ship to be manufacturing because it changes an unmarketable product into a marketable product.

Ms. Segal also presented testimony concerning the need for new LNG facilities, specifically in the Mid-Atlantic region, the suitability of the chosen site for an LNG facility and the steps taken by BP (Crown Landing

LLC's parent company) to ensure safety of the LNG ships while in the Delaware River and the safety of the facility as a whole.

In response to a question from the Board, Ms. Segal testified that it is her judgment that if the facility for unloading LNG were substantially distant from the proposed site, that site would not be useful as the gasification facility.

2. Laurie J. Beppler, Engineering Manager for the Crown Landing project. Ms. Beppler described, in greater detail, the construction and operation of the proposed facility. Ms. Beppler testified that LNG could not be transported safely overland to the site from an off-loading dock located some distance away. Rather, the dock and the land-based components of the facility must be considered an integrated facility. As had Ms Segal, Ms. Beppler testified that, in her judgment, the proposed site would not be useful as the gasification facility if it were substantially distant from the facility for unloading LNG.

3. Dr. Georges Melhem, Chair and Chief Engineer of ioMosaic Corporation, a company specializing in safety consulting services. Dr. Melhem testified that the product going into the distribution pipelines from the proposed facility would be a new product, not the same product that was on the ship, and therefore the onshore component meets the definition of a manufacturing facility.

Dr. Melhem also testified as to the similarities and differences between the proposed facility and one located on adjacent land. The adjacent facility, the Logan (formerly "Keystone") cogeneration plant, received a permit under the Act for a docking facility for the off-loading of coal that is subsequently burned to produce electricity. Dr. Melhem testified that the Logan facility has more characteristics of heavy industry than would the proposed Crown Landing facility and, therefore, he concludes that the proposed facility is not heavy industry.

4. Dr. William Fagerstrom, a professor in the Mechanical Engineering Department at the University of Delaware. Dr. Fagerstrom teaches a course in manufacturing and testified that, according to the definitions used in his class, the onshore component of the proposed Crown Landing construction is manufacturing. In particular, Dr. Fagerstrom pointed out that the nitrogen used to dilute the LNG is "manufactured" on site.

5. David Blaha, of Environmental Resources Management Group, Inc., an expert in evaluating the potential environmental impact of projects. He emphasized the superiority of LNG as a fuel, the greater potential for pollution of the Logan cogeneration plant and the appropriateness of the site selected for the Crown Landing facility, primarily because the facility could use waste heat from the Logan cogeneration plant.

DNREC called Dr. Stanley I. Sandler as its only witness. Dr. Sandler gave a written statement as well as live testimony. Dr. Sandler testified that the onshore component of the proposed facility would not manufacture a new product or transform in any significant way the natural gas off-loaded from a ship at the dock. To the extent that natural gas is processed in a meaningful context, that processing occurs at the well head as the gas is captured and chilled. The gas that would leave the ship at the dock is essentially the same product that would enter the distribution pipelines.

At least eleven members of the public were heard by the Board. Most of the testimony of these speakers was directed to the dangers, real or perceived, of an LNG facility and ships carrying LNG up the Delaware River due to vulnerability to intentional attack, catastrophic accident or other failures. In addition, many speakers' comments concerned negative impacts on neighboring communities such as the impact on recreation and on business efficiency.

One witness argued that the proposed facility is essentially identical to the Logan facility, is a necessary addition to the economy of the region and will ensure the availability of natural gas essential to the production of electricity as well as growth of important industry in the region. The possibility of as many as fifty new jobs in the region was mentioned.

Every witness who addressed the issue testified that the onshore component of the proposed construction includes some but not all characteristics of a "heavy industry" as defined by the Act. The evidence as a whole reveals a significant and unresolved issue as to the safety and potential to pollute of the facility and its ships which are essential to the operation of the facility.

The Board finds, as a matter of fact, that the onshore component of the proposed facility is not a "manufacturing" facility. Rather, the facility is a single, integrated facility the onshore component of which exists solely to support the offshore component. The real sole purpose of the proposed facility is to serve as a bulk product transfer facility. Furthermore, the proposed facility has many of the characteristics of heavy industry and there remain significant questions regarding the potential impact on adjacent communities.

CONCLUSIONS OF LAW

Both the provisions of the Coastal Zone Act (7 Del. C. Chapter 70), ("the Act") and the Regulations Governing Delaware's Coastal Zone adopted May 11, 1999, as amended, ("Regulations") are binding on this Board.

Section 7003 of the Act absolutely prohibits new bulk product transfer facilities in the coastal zone. The proposed construction is a bulk product transfer facility as defined by § 7002 of the Act unless it qualifies for the exception found in the second sentence thereof: "Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a

permit is granted or which is a nonconforming use."[1] The Regulations clarify this exception:

> The following uses or activities are permissible in the Coastal Zone by permit. Permits must be obtained prior to any land disturbing or construction activity.
>
> 1. The construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.

Regulations, § F. 1.

Thus construction that otherwise would be prohibited as a bulk product transfer facility is permissible if it includes two distinct components: (1) a docking facility or pier or pipelines and (2) one single permitted on-shore manufacturing or other facility which is served by the docking facility or pier or pipelines. "Docking Facility" is defined in the Regulations as follows:

> 6. "Docking Facility" means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping,

---

[1] Although the onshore part of the proposed construction is to be located in New Jersey and, therefore, is not eligible for a permit under the Act, the Board considers the nature of the entire construction for purposes of this decision and considers a facility which would be eligible for a permit if located in Delaware to be a "facility for which a permit is granted. . . ."

storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

Regulations, § C.6.

The construction would be prohibited if the onshore component is heavy industry, since all new heavy industry is prohibited and ineligible for a permit. The Act defines "heavy industry" at § 7002(e) as follows:

"Heavy industry use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of

> offshore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

DNREC and several public speakers argue that the Logan/Keystone cogeneration permit is not applicable precedent since that permit allowed the construction of a docking facility to serve an onshore component which properly is considered a manufacturing facility in that it consumes the off-loaded product (coal) and produces a different product (electricity) for distribution. In contrast, the proposed Crown Landing docking facility would serve an onshore component which would produce for distribution the same product (natural gas) that is off-loaded at the docking facility. DNREC argues that the more relevant precedent, cited by several public speakers, is the 1972 denial of a permit to El Paso Eastern Company for the construction of a pier in Delaware waters serving an LNG terminal in New Jersey. That denial, which was decided early in the history of the Act and predated the adoption of the Regulations, cites an analysis of the Act from the Attorney General which states, in part:

> It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the 'industrial facility' but the docking facility.

The Board finds a similar analysis applies to the proposed Crown Landing construction. Having found that the proposed construction is a single integrated facility for the bulk transfer of natural gas, the Board concludes, as a matter of law, that the entire proposed facility is a docking facility which does not support a manufacturing or other facility. Consequently, the proposed construction is

absolutely prohibited by the Act and no permit therefor may be issued.

BOARD'S DECISION

For the foregoing reasons, the Board, by a unanimous vote of the six members present, affirms the Secretary's decision and finds that the proposed construction is a use absolutely prohibited by the Coastal Zone Act.

/s/ CHRISTINE M. WAISANEN
Christine M. Waisanen,
Chair

/s/ JOHN ALLEN
John Allen
Board Member

/s/ PAUL BELL
Paul Bell
Board Member

/s/ ALBERT HOLMES
Albert Holmes
Board Member

/s/ PALLATHER SUBRAMANIAN
Pallather Subramanian
Board Member

/s/ VICTOR SINGER
Victor Singer
Board Member

Date: April 14, 2005

APPENDIX 2 - AFFIDAVIT OF R. PEDER HANSEN DATED OCTOBER 21, 2005

No. 11, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

AFFIDAVIT OF R. PEDER HANSEN IN OPPOSITION OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

R. Peder Hansen, being duly sworn, deposes and says:

1. I am an Environmental Program Manager II in the Surface Water Discharges Section, Division of Water Resources, of the Delaware Department of Natural Resources and Environmental Control ("DNREC"), an agency of the State of Delaware. I have served as an Environmental Program Manager II in the Division of Water Resources since 1993. I am responsible for the review of all applications for discharges into the Delaware River, including discharges into the Delaware River within Delaware territory known as the Twelve Mile Circle. I

have knowledge of the matters set forth herein based upon my personal knowledge and upon my review of the DNREC files relating to the matters addressed below.

2. DNREC does not require that a New Jersey applicant who is seeking to discharge into the Delaware River from the New Jersey shore obtain a permit from both New Jersey and Delaware, even though the outfall may cross the boundary of New Jersey into Delaware within the Twelve Mile Circle. Delaware does not require DNREC permits for such discharges because the United States Environmental Protection Agency ("EPA") provides uniform minimum standards for discharges into the Delaware River under the federal Clean Water Act, 33 U.S.C.A. § 1251 *et seq.* (2005) ("CWA") and the National Pollution Discharge Elimination System ("NPDES") Program pursuant to 33 U.S.C.A. §§ 1311 and 1342(a) (2005).

3. Federally delegated discharge permitting authorities, such as Delaware and New Jersey, must obtain approval from the EPA to assure that minimum water quality discharge standards under the CWA are adopted as a component of any State permitting program that also serves as a Federal permit. See 40 C.F.R. § 123 *et seq.* Under federal regulations promulgated under NPDES, no permit for discharge may be issued when the imposition of permit conditions cannot ensure compliance with the applicable water quality requirements of all affected States. 40 C.F.R. § 122.4(d). Therefore, under 40 C.F.R. § 122.4(d), New Jersey may not issue a permit for discharge into the Delaware River within the Twelve Mile Circle unless Delaware water quality requirements are satisfied. Consequently, there is no reason for Delaware to issue a separate permit for discharges within the Twelve Mile Circle when the EPA requires New Jersey to satisfy Delaware's water quality standards.

4. Delaware also ensures compliance with Delaware's water quality standards for discharges through its participation in the Delaware River Basin Commission

("DRBC"). The DRBC exists pursuant to an interstate compact between Delaware, New Jersey, New York, and Pennsylvania, which constitute the States bordering the Delaware River. Del. Code Ann. tit. 7 § 6501. As a signatory to the Delaware River Basin Compact, Delaware appoints a representative who serves as a voting member of the DRBC. The DRBC receives notice of, and provides its own approval for, proposed discharges within the Delaware River basin, including proposed discharges within the Twelve Mile Circle. If New Jersey were to issue a permit for discharges into the Delaware River within the Twelve Mile Circle that did not conform to Delaware's water quality standards, Delaware could assure compliance with its water quality standards as an affected State through the DRBC permitting process.

5. In light of the avenues for assuring compliance with Delaware's water quality standards through federal law and the Delaware River Basin Compact, Delaware has chosen to avoid needless overregulation of water discharges from the New Jersey shore.

/s/ R. PEDER HANSEN
R. Peder Hansen

Subscribed And Sworn To
Before Me This 21st Day
Of October, 2005

/s/ LAURIE MOYER
Notary Public
Of The State Of Delaware

[Notary Stamp omitted]

APPENDIX 3 – AFFIDAVIT OF KEVIN P. MALONEY DATED OCTOBER 23, 2005

No. 11, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

AFFIDAVIT OF KEVIN P. MALONEY IN OPPOSITION OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

STATE OF DELAWARE :
: SS
COUNTY OF KENT :

Kevin P. Maloney, Esquire, being duly sworn, deposes and says:

1. I currently serve as a Deputy Attorney General for the State of Delaware. In that capacity I act as one of several counsel for the Delaware Department of Natural Resources and Environmental Control ("DNREC"). I have knowledge of the matters set forth herein, based upon my personal knowledge and based upon my review of the files maintained by DNREC.

2. Delaware first adopted a statute regulating the sale, lease, or easements to subaqueous public lands in 1961. 53 Del. Laws ch. 34. This statute was extended in 1964. 54 Del. Laws ch. 228. In 1966, Delaware adopted the Underwater Lands Act, which regulated, *inter alia*, the sale and lease of subaqueous lands. 55 Del. Laws ch. 442. In 1986, the Delaware General Assembly adopted a new Subaqueous Lands Act, which regulates public and private subaqueous lands within the State of Delaware. 65 Del. Laws ch. 508; Del. Code Ann. tit. 7 ch. 72.

3. Since 1961, when the first statute regulating the sale and lease of subaqueous lands in Delaware was adopted, Delaware has issued the following eleven subaqueous land leases and/or permits for use of Delaware's subaqueous lands within the Twelve Mile Circle for projects entering Delaware territory from the New Jersey shore.

4. On January 11, 1962, Delaware entered into a twenty-year subaqueous land lease allowing the SunOlin Chemical Company ("SunOlin") to use Delaware subaqueous soil within the Twelve Mile Circle to construct, maintain, repair, replace, renew and operate submarine pipelines across the Delaware River from Claymont, Delaware to Gloucester County, New Jersey. Delaware renewed this lease on November 14, 1981 for a period of ten years. This lease was again renewed on October 15, 1991 for a period of ten years, and on May 15, 2002 for a period of twenty years.

5. On October 9, 1963, Delaware entered into a ten-year subaqueous land lease allowing the Colonial Pipeline Company to use Delaware subaqueous soil within the Twelve Mile Circle near Logan Township New Jersey to construct, maintain, inspect, operate, renew, replace, repair, improve and remove submarine pipelines, from Claymont, Delaware to Logan Township, Gloucester County, New Jersey.

6. On or about September 29, 1971, Delaware granted a ten-year lease to allow E.I. du Pont de Nemours & Co., Inc. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility within the Twelve Mile Circle near the New Jersey shore, "without prejudice to the title claim of either party."

7. On March 18, 1982, Delaware granted permission to DuPont in Deepwater, New Jersey to repair and replace an existing 36 pile cluster in Delaware subaqueous soil within the Twelve Mile Circle.

8. On July 28, 1987, Delaware entered into a ten-year subaqueous lands lease allowing the Columbia Gas Transmission Corp. to construct a submerged natural gas pipeline across the Delaware River within the Twelve Mile Circle. The lease also allowed Columbia Gas to dredge 552 cubic yards of material from Delaware subaqueous lands. This lease was renewed on January 8, 1998.

9. On August 3, 1987, Delaware entered into a ten-year subaqueous lands lease allowing the Colonial Pipeline Company to construct a 30 inch submerged petroleum pipeline across the Delaware River within the Twelve Mile Circle, and dredge Delaware subaqueous lands.

10. On September 30, 1991, Delaware entered into a ten-year subaqueous land lease allowing Keystone Cogeneration Systems, Inc. ("Keystone") to dredge 40,000 cubic yards of material from the Delaware River within the Twelve Mile Circle to create a 910 feet by 150 feet barge berth. The lease also permitted Keystone to construct a coal unloading pier for a facility located in Logan Township, New Jersey. A twenty-year renewal of this lease was executed by the State of Delaware on November 9, 2001.

11. On February 7, 1996, the Delaware entered into a ten-year subaqueous land lease allowing the New Jersey

Department of Environmental Protection, Division of Parks and Forestry, to rehabilitate a pier and construct a new floating ferry dock on Delaware subaqueous soil within the Twelve Mile Circle near Fort Mott State Park in Salem County, New Jersey.

12. On December 9, 1997, Delaware entered into a ten-year subaqueous land lease allowing Delmarva Power and Light Company to install 3,755 linear feet of submarine fiber optic cable in the Delaware River within the Twelve Mile Circle extending from Pigeon Point in New Castle County, Delaware, to Deepwater Point in New Jersey. This lease was amended on March 11, 2002.

13. On May 4, 2001, Delaware issued a subaqueous lands permit to DuPont Chambers Works located near Deepwater, New Jersey, to allow DuPont to dredge approximately 4,650 cubic yards of material from the Delaware River within the Twelve Mile Circle, to backfill existing elevations on a 0.71 acre site in the Delaware River, and to install a temporary sheet pile wall surrounding the proposed excavation in the Delaware River.

14. On May 10, 2005, DNREC entered into a twenty-year subaqueous lands lease allowing Fenwick Commons, LLC, fill approximately 1,882 square feet of Delaware subaqueous lands at the Penns Grove Riverfront and Pier, in Penns Grove, New Jersey, in connection with the construction of a 40 foot wide by 750 foot long pier and related structures.

/s/ KEVIN P. MALONEY
Kevin P. Maloney

Subscribed And Sworn To
Before Me This 23rd Day
Of October, 2005

/s/ MAX B. WALTON
Notary Public
Of The State Of Delaware

APPENDIX 4

OPINIONS OF NEW JERSEY ATTORNEY GENERAL.
(1954 N.J. Op. Atty. Gen. 6)

February 2, 1954.

HON. CHARLES R. ERDMAN JR.
Commissioner, Department of Conservation and Economic Development
520 East State Street
Trenton, New Jersey

FORMAL OPINION 1954 — No. 3.

Dear Commissioner:

You have requested a formal opinion as to the legal authority of your Department, with respect to lands below low water mark in the Delaware River within the so-called twelve-mile Delaware Circle, (1) to make riparian grants and (2) to issue licenses and fix a charge for the dredging of bottom material pursuant to R. S. 12:3-22.

As you have noted, the decree of the United States Supreme Court entered June 3, 1935 in the Delaware boundary case (*N. J. v. Delaware*, 295 U. S. 694) fixed the boundary within the Delaware Circle at the mean low water line on the New Jersey side of Delaware River and this decree was made without prejudice to the rights of either state under the Compact of 1905, which was enacted in New Jersey as R. S. 52:28-34, et seq. The Compact provides generally for the service of civil and criminal process by either State upon any portion of the Delaware River, for the common enjoyment of fishing rights throughout the waters of said river between the low water marks on each side thereof, and for riparian jurisdiction. This last item is covered by Article VII, which reads as follows:

"Each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases and conveyances of riparian lands and rights under the laws of the respective states." (L. 1905, c. 42, Art. VII, p. 71.)

Article VIII of the Compact reads:

"Nothing herein contained shall affect the territorial limits, rights or jurisdiction of either state of, in or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." (L. 1905, c. 42, Art. VIII, p. 71.)

In my opinion, the State of New Jersey has by virtue of Article VII the complete and exclusive right to make grants and leases of riparian lands below low water mark on its side of the river.

In the first place, as was observed in the opinion of the United States Supreme Court in *New Jersey v. Delaware*, 291 U. S. 361, the State of Delaware has apparently never claimed to own the shore between high and low water mark on the New Jersey side; that part of the shore has always belonged to the State of New Jersey. *State v. Jersey City*, 25 N. J. L. 525, 527. Since New Jersey owned to low water mark in any event, the Article (VII) granting to each State the right to continue to exercise riparian jurisdiction of every kind and nature and to make grants and leases of riparian lands under its own laws would have had no meaning or purpose unless it applied to lands below the low water mark. An act of the Legislature should be so construed that, if it can be prevented, no part thereof shall be superfluous, void or insignificant. *Steel v. Freeholders of Passaic*, 89 N. J. L. 609, 612; *Ford Motor Company v. New Jersey Dept. of Labor and Industry*, 5 N. J. 494, 509.

In the next place, I am informed that two grants of land below low water mark were made by the predecessor of

your Navigation Bureau before the Compact of 1905 was entered into. It was also noted in the opinion of the Supreme Court in the Delaware boundary case (291 U. S. 361, 375) that the riparian proprietors on the New Jersey shore had for many years exercised dominion over the land below low water mark by building wharves and piers out into the river, in accordance with licenses or privileges granted by the State of New Jersey. When the Compact provided in Article VII that New Jersey on its own side of the river might "*continue* to exercise riparian jurisdiction of every kind and nature and to make grants, etc.," it obviously contemplated the continuance of the exercise of riparian jurisdiction as theretofore, including the making of grants for lands below low water mark.

I am further informed that since the yea 1905 thirty grants of such land have been made by the State of New Jersey, and that no claim has been made by the State of Delaware of any right to make riparian grants on the New Jersey side of the river. The practical construction thus placed by the parties upon the Compact in question, and adhered to by them for approximately fifty years, is entitled to great weight. *State v. Rogers*, 56 N. J. L. 480, 646; *Passarella v. Board of Commissioners*, 1 N. J. Super. 313, 320.

A contrary view would require a riparian owner who desired to acquire riparian lands below low water mark to undergo the cumbersome procedure of applying first to the State of New Jersey for a grant of the foreshore and then to the State of Delaware for a grant of the land below low water mark. "We cannot attribute to the Legislature a purpose so at variance with the common sense of the situation when the language used is susceptible of a construction in harmony with it." *Township Committee of Freehold Township v. Gelber*, 26 N. J. Super. 388, 391.

For these reasons we are convinced that by virtue of the Compact above referred to, the State of Delaware has given to the State of New Jersey the power to grant ripar-

ian lands adjacent to the New Jersey shore even though the title to said lands is in the State of Delaware.

As to your authority to issue licenses and fix a charge for the dredging of bottom material below low water mark, I am compelled to a different conclusion.

As we have seen, Article VIII of the Compact provides that nothing contained therein shall affect the rights of either State or the ownership of the subaqueous soil in the Delaware River except as set forth in the Compact; and the only exceptions made by the Compact to the jurisdiction of the State of Delaware over its territory in the Delaware River are the service of civil and criminal process, the common enjoyment of fishing rights, and the provisions of Article VII for the exercise of "riparian jurisdiction of every kind and nature" and the granting of "riparian lands and rights." Dredging and removing material from subaqueous soil (other than soil owned by a riparian proprietor) is not a riparian right, nor is the licensing of such activity an exercise of riparian jurisdiction. The word "riparian" is derived from the Latin word "ripa", which means "bank", and it is defined in Webster's Dictionary as "pertaining to * * * the bank of a river". Accordingly, the word "riparian" ordinarily refers to the bank and not the bed of the stream, and riparian rights are generally defined as those which grow out of the ownership of the banks, rather than the beds, of streams. *Gough v. Bell*, 22 N. J. L. 441, 464; *Rome Ry. & Light Co. v. Loeb*, 80 S. E. 785, 787, 141 Ga. 202; *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 123 N. E. 200, 202, 226 N. Y. 38; *cf. City of Paterson v. East Jersey Water Co.*, 74 N. J. Eq. 49, 63, aff'd, 77 N. J. Eq. 588.

Unlike the situation in respect to grants, New Jersey has never undertaken to issue licenses for dredging within the twelve-mile Circle. Moreover, R. S. 18:3-22 provides only for licenses to dredge or remove any deposits of sand or other material "from lands of the state" under tide waters. The lands below low water mark within

the twelve-mile Circle are not lands of this State, but lands of the State of Delaware.

In view of the foregoing, I find no authority for your Department to exercise the power in question with respect to the lands under discussion.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: THOMAS P. COOK
Deputy Attorney General

APPENDIX 5

STATE OF DELAWARE
EXECUTIVE DEPARTMENT
PLANNING OFFICE
DOVER

RUSSELL W. PETERSON
GOVERNOR

DAVID R. KEIFER
DIRECTOR

February 23, 1972

Commissioner Richard Sullivan
Department of Environmental Protection
P.O. Box 1390
Trenton, New Jersey 08625

Dear Commissioner Sullivan:

The Director of the State Planning Office has asked me to provide your Department with a copy of his status decision under terms of Delaware's Coastal Zone Act on the proposed pier for a liquified natural gas terminal of the El Paso Eastern Company planned for a site near Penns Grove, New Jersey.

I believe Mr. Keifer has spoken to you on the telephone about this project. He mentioned that perhaps you would bring this to the attention of Mr. Richard D. Goodenough of the Division of Marine Services.

If you have any questions or comments, please don't hesitate to call or write at any time.

Yours very truly,

/s/ JOHN SHERMAN
John Sherman
Planner III

JS/daf

Enclosure

APPENDIX 6

Office of the Attorney General
State of Delaware

Opinion No. 78-018
October 5, 1978

Nathan Hayward III
Director
Office of Management, Budget & Planning

QUESTIONS:

1. Does the exemption for docking facilities for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use, found in 7 Del. C. § 7002(f), apply to docking facilities that are located in the State of Delaware but serve an industry located in the State of New Jersey on the eastern side of the Delaware River?

2. Does the term "bulk products" as used in the Coastal Zone Act (a) refer to cargoes shipped in large bulk masses such as oil, gas, coal and iron ore; (b) also apply to cargoes of individually identifiable units such as container packets or items of machinery or goods?

ANSWER:

1. The exemption found in 7 Del. C. § 7002(f) applies to facilities that are located on the eastern boundary of Delaware which serve an industry located in New Jersey in the same context that it would apply if the attached facility were located on fast land in Delaware.

2. The term "bulk product" refers to cargoes shipped in large mingled masses and not to cargoes of individually packaged units or individual product items.

DISCUSSION:

The Coastal Zone Act, 7 Del. C. Chapter 70 (the "Act") was adopted in 1972 amid concerns regarding the future direction of development in the coastal area of Delaware. The explicit purpose was to regulate land use in the "most critical areas for the future of the state in terms of the quality of life in the State". 7 Del. C. § 7001. The same section declares that the public policy of the State of Delaware is to control the location, extent and type of industrial development in Delaware's coastal waters. The second purpose is to "better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." *Id.* The remainder of that section makes it clear that the purpose is not to discourage industry but rather to protect the small critical area which comprises the coast of Delaware.

Water and air quality are a definite part of the environment sought to be protected by the General Assembly. 7 Del. C. § 7004(b)(1). The General Assembly has recognized, however, that an exemption for a single use facility would not interfere with the dual purposes of the Coastal Zone Act in such a way to be impermissable under the legislative purpose. 7 Del. C. § 7002(f). This section states:

"Bulk product transfer facility" means any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa. Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use. Likewise, docking facilities for the Port of Wilmington are not included in this definition.

The eastern boundary of the State of Delaware extends in part to the low water mark on the eastern side of the Delaware River within the 12 mile circle described from New Castle. 29 Del. C. § 201. If the development on the eastern rim of the state were to be uncontrolled by the

regulatory mechanism of the Coastal Zone Act, pressure of development antithetical to the Act would exist. As the Act states: "It is further determined that offshore bulk product transfer facilities represent a *significant danger* of pollution to the coastal zone and general pressure for the construction of industrial plants in the coastal zone . . . For these reasons, prohibition against bulk product transfer facilities in the coastal zone is deemed imperative." 7 Del. C. § 7001.

The question then becomes the extent to which these same rules apply where the adjacent facility is located in another jurisdiction over which the Delaware legislature has no authority. There is no reason to believe that the legislature intended any different rule to apply to unattached lands from the lands attached to the Delaware shore within the Coastal Zone. Allowing the bulk product transfer facilities to generate pressure for industry anywhere in the water and air basins would be contrary to the purposes of the Act. This would apply no less to that part of Delaware which is *located adjacent to New Jersey* than to the fast lands of Delaware itself.

Failure to apply the exemption to those facilities built adjacent to New Jersey would lead to an anomalous administration of the Act. The Act should not be read so as to produce an absurd result. *Opinion of the Justices*, Del. Supr., 295 A.2d 718 (1972) and *State v. Braun*, Del. Super, 378 A.2d 640 (1977).

As to the second question, the term "bulk" is defined in *Webster's Unabridged Dictionary* as "in a mass; loose; not enclosed in separate package or divided in separate parts". *Webster's Third New International Dictionary*, p. 293 (Ed. 1961). There are a number of cases in accord with the dictionary meaning of the word "bulk", thus it has been held to be "neither counted, weighed, nor measured", *Riggs v. State*, Neb. Supr., 121 NW 588 (1909); contra distinguished from "parcel", *Standard Oil v. Commonwealth*, Ky. Ct. App., 82 SW 1020 (1904); "of indefinite proportion", *Naftalin v. John Wood Co.*, Minn. Supr,

116 NW 2d 91 (1962). The term "laden in bulk" means loose in the hold or not included in boxes, bales or casks, *Standard Oil Co., supra*. The cited cases use the commercial definition of the term. Terms in a statute relating to trade or commerce are presumed to be used in their trade or commercial sense. 2A Sutherland, *Statutory Construction* (Sands 4th ed 1973) § 47.31. In this case, the commercial and the dictionary meaning are in accord. Therefore, the prohibition in 7 Del. C. § 7003 against offshore gas, liquid or solid bulk product transfer facilities would not refer to individual products or packages.

In summary, the State of Delaware should apply the exemption for the single use bulk product transfer facility in the same manner as if the attached facility were also located in Delaware. Therefore, if a permit would have been granted or if the facility would be a nonconforming use had the facility been located in Delaware, the single use exemption may apply. The term "bulk" refers to commingled goods and not to individual packages or products.

If you have any further questions, please feel free to call me.

Sincerely,

June D. MacArtor
Deputy Attorney General

APPROVED BY:

Richard R. Wier, Jr.
Attorney General

APPENDIX 7

NEW JERSEY COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT

August 1980

Prepared by:

State of New Jersey
Department of Environmental Protection
Division of Coastal Resources
Bureau of Coastal Planning and Development
P.O. Box 1889
Trenton, New Jersey 08625

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
Office of Coastal Zone Management
3300 Whitehaven Street, N.W.
Washington, D.C. 20235

* * * * *

CHAPTER 2 BOUNDARY

Summary
Inland Boundary
Seaward and Interstate Boundaries

****

Summary

New Jersey's coastal zone extends from the New York border south to Cape May Point and then north to Trenton. It encompasses the waters and waterfronts of the Hudson River and related water bodies south to the Raritan Bay, the Atlantic Ocean and some inland areas from Sandy Hook to Cape May, the Delaware Bay and some inland areas, and the waterfront of the Delaware River and related tributaries.

The coastal zone encompasses areas in which the State, through the Department of Environmental Protection and the Hackensack Meadowlands Development Commission, has the authority to regulate land and water uses that have a significant impact on coastal waters. These authorities include the Coastal Area Facility Review Act (CAFRA), the Wetlands Act, the Waterfront Development Law, Tidelands statutes, and the Hackensack Meadowlands Reclamation and Development Act.

Inland Boundary

The inland boundary for the portion of the coast from Raritan Bay south to Cape May Point and then north along the Delaware Bay (consisting of parts of Middlesex, Monmouth, Ocean, Burlington, Atlantic, Cape May, Cumberland and Salem Counties), is defined as:

> the landward boundary of the Coastal Area as defined in the Coastal Area Facility Review Act (CAFRA, N.J.S.A. 13:19-4), or the upper boundary of

coastal wetlands located landward of the CAFRA boundary along tidal water courses flowing through the CAFRA area, whichever is more landward, including State-owned tidelands.

In the more developed portions of the State (including portions of Salem, Gloucester, Camden, Burlington, Mercer, Middlesex, Somerset, Union, Hudson, Essex, Passaic and Bergen Counties), the coastal zone boundary is defined as:

> the landward boundary of the State's jurisdiction under the Waterfront Development Act (N.J.S.A. 12:5-3)* or Wetlands Act (N.J.S.A. 13:9A-1), or the landward boundary of State-owned tidelands, whichever extends farthest inland.

This boundary (discussed below in "Principal Program Authorities") ensures that the State will regulate at least the first 100 feet inland from all tidal waters. The State will consider all land within 500 feet of tidal water to be within this boundary unless demonstrated otherwise. This represents a substantial reduction from the coastal zone boundary DEP proposed in several publications between December 1976 and March 1979, which would have extended the coastal zone inland to the first road or railroad, regardless of its distance from the water (See Appendix B).

The boundary of the Hackensack Meadowlands region is defined as:

> the boundary of the area defined as the Hackensack Meadowlands District by the Hackensack Meadowlands Reclamation and Development Act. (N.J.S.A. 13:17-4)

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* The definition of the inland jurisdictional boundary of the Waterfront Development Law is: the first public road, railroad right-of-way, or property line generally parallel to any navigable waterway, but in no case more than 500 feet or less than 100 feet inland from mean high water.

A generalized map of the Statewide Coastal Zone Boundary is shown in Figure 1 in Part I of this document, and Figure 2 is a sketch of the boundary in different parts of the State.

The boundary encompasses approximately 1,792 miles of tidal coastline, including 126 miles along the Atlantic Oceanfront from Sandy Hook to Cape May. It ranges in width from one hundred feet to twenty-four miles (near Batsto and the Mullica River, in Burlington County). The total land area of the Bay and Shore region is approximately 1,376 square miles or 17 percent of New Jersey's land area.

Research indicates that there has been a rising trend in the level of the ocean, relative to coastal land, along the northern East Coast of the United States. Hicks* data places the rise at about 8 inches between the 1890s and 1970. If this trend continues, tidal waters will penetrate further up the State's coastal rivers. Should this change become significant, the coastal zone boundary and the area under the jurisdiction of the Waterfront Development Law, will be redelineated accordingly.

Seaward and Interstate Boundaries

The seaward boundary of the coastal zone is the three nautical mile limit of the United States Territorial Sea, and the interstate boundaries of the States of New York and Delaware and the Commonwealth of Pennsylvania.

In most of Salem County, the Delaware – New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water must obtain coastal permits from both states. New Jersey and

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* S.D. Hicks, "As the Oceans Rise", National Ocean Survey, NOAA, Vol. 2, No. 2, pp. 22-24, 1972.

Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.

* * * * *

APPENDIX 8

Site Remediation Program
Office of Dredging and Sediment Technology
P.O. Box 028
Trenton, NJ 08625
(609) 292-1250
FAX (609) 777-1914

February 4, 2005

[Filed Stamp omitted]

Mr. David Blaha
Environmental Resources Management
200 Harry S. Truman Parkway Suite 400
Annapolis, MD 21401

RE: Deficiency Letter for Waterfront Development Application
File No. 0809-02-0011.1
Applicant: Crown Landing LLC
Project: Crown Landing LNG Import Terminal
Block: 101; Lot: 2
Location: Logan Township, Gloucester County

Dear Mr. Blaha:

The Office of Dredging and Sediment Technology (ODST) has reviewed the above referenced Waterfront Development Permit application received by the Department on January 7, 2005. Please be advised that the information submitted with your application has been reviewed and found to be deficient with respect to the Application Contents requirements found at N.J.A.C. 7:7 Chapter 7 and the Coastal Zone Management Rules N.J.A.C. 7:7E et. Seq. as detailed below.

In order to facilitate the review process this application should reference and/or include all related supporting materials such as the Resource Reports submitted to the federal Energy Regulatory Commission and other supporting information, which may be found in other reports or documents.

The project site is located in the States of Delaware and New Jersey. Accordingly, activities taking place from the mean low water line (MLWL) outshore are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations. Activities or associated impacts to New Jersey's coastal resources occurring from the MLWL landward are the subject of this application.

The project consists of the construction and operation of a liquefied natural gas (LNG) terminal in Logan Township, Gloucester County NJ. The proposed work entails: construction of berthing pier located in the Delaware River; approximately 800,000 cubic yards of associated dredging (in Delaware State waters) with disposal of dredged materials in New Jersey at the White's/Weeks Confined disposal facility (CDF) located in Logan Township. Other land-based constructions activities consist of three storage tanks with a combined storage capacity of 11.1 billion cubic feet of LNG with associated containment dikes; various buildings stormwater and parking facilities; and gas pipeline tie-ins.

This letter identifies the applicable sections of the respective CZM Rule, which are provided in Italics for reference. The text of the deficiency analysis shall appear in bold following each Rule.

SUBCHAPTER 3 - Special Area Rules

7:7E-3.5 Finfish Migratory Pathways

(a) Finfish migratory pathways are waterways (rivers, stream, creeks, bays and inlets) which can be determined to serve as passageways for diadromous fish to or from seasonal spawning areas, including juvenile anadromous fish which migrate in autumn and those listed by H.E. Zich (1977) "New Jersey Anadromous Fish Inventory" NJDEP Miscellaneous Report No. 41, and including those portions of the Hudson and Delaware Rivers within the coastal zone boundary.

1. *Species of concern include: alewife or river herring (Alosa pseudoharengus), blueback herring (Alosa sapidissima), American shad (Alosa aspidissima), striped bass (Monroe saxatilis), Atlantic sturgeon (Acipenser oxyrhynchus), Shortnose sturgeon (Acipenser brevirostrum) and American eel (Anguilla rostrata).*

(b) Development, such as dams, dikes, spillways, channelization, tide gates and intake pipes, which creates a physical barrier to the movement of fish along finfish migratory pathways is prohibited, unless acceptable mitigating measures such as fish ladders, erosion control, or oxygenation are used.

(c) Development which lowers water quality to such an extent as to interfere with the movement of fish along finfish migratory pathways or to violate State and Delaware River Basin Commission water quality standards is prohibited.

1. *Mitigating measures are required for any development which would result in: lowering dissolved oxygen levels, releasing toxic chemicals, raising ambient water temperature, impinging or suffocating fish, entrainment of fish eggs, larvae or juveniles, causing siltation, or raising turbidity levels during migration periods.*

The (ODST) is awaiting comments by the Division of Fish and Wildlife (DFGW) concerning project activities that may adversely affect finfish migratory pathways. The applicant has not discussed pile driving and related in-water construction activities which may generate noise which can interfere with the movement of fish along migratory pathways in the Delaware River. Clupids are known to be affected by hydroacoustic pulses associated with pile driving activities. Timing restrictions imposed upon the work, if approved, may suffice in addressing some impacts such as hydroacoustic affects. However, additional impacts associated with the withdraw of ballast water may have adverse impacts to ichoplankton and early life stages of Marine fish which occur in the Delaware River. These impacts and the requisite mitigate measures must be addressed to demonstrate compliances with this Rule.

Navigational Channels 7:7E-3.7

(a) Navigation channels include water areas in tidal rivers and bays presently maintained by the DEP or the Army Corps of Engineers and marked by US Coast Guard with buoys or stakes, as shown on NOAA/National Ocean Survey Charts: 12214, 12304, 12311, 12312, 12313, 12314, 12316, 12317, 12318, 12323, 12324, 12326, 12327, 12328, 12330, 12331, 12332, 12333, 12334, 12335, 12337, 12341, 12343, 12345, 12346, and 12363.

1. *Navigation channels also include channels marked with buoys, dolphins, and stakes, and maintained by the State of New Jersey, [and] access channels and anchorage's.*
2. *Navigation channels include all areas between the top of the channel slopes on either side.*

(b) Standards relevant to navigation channels are as follows:

1. *New or maintenance dredging of existing navigation channels is conditionally acceptable providing that the condition under the new or maintenance dredging rule is met (see N.J.A.C. 7:7E-4.2(f) and (g)).*

2. *Development which would cause terrestrial soil and shoreline erosion and siltation in navigation channels shall utilize appropriate mitigation measures.*

3. *Development which would result in loss of navigability is prohibited.*

4. *Any construction which would extend into a navigation channel is prohibited.*

5. *The placement of structures within 50 feet of any authorized navigation channel is discouraged, unless it can be demonstrated that the proposed structure will not hinder navigation.*

Based on information provided the ship berth site is over 1,500 feet away from the federal navigation channel. The applicant has not submitted, as part of this application, information concerning the cueing of ships waiting to dock at the facility and or associated tugboats which would tend the ships being docked and departing the dock. Additional information is required in the form of a plan drawn to scale depicting LNG and tender vessels in relation to the river channel, including turning radii and the route to and from the dockage position from the channel. In addition, the Department is awaiting review findings from the U.S. Coast Guard concerning impacts to navigation arising from the proposed Crown Landing LNG facility operation. These items must be addressed to demonstrate compliance with this Rule.

7:7E-3.15 Intertidal and Subtidal Shallows

(a) Intertidal and subtidal shallows means all permanently or temporarily submerged areas from the spring high water line to a depth of four feet below mean low water.

(b) Development, filling, new dredging or other disturbance is discouraged but may be permitted in accordance with (c), (d), (e), and (f) below and with N.J.A.C. 7:7E-4.2 through 4.20.

(c) New dredging in intertidal and subtidal shallows is discouraged, unless it complies with the following conditions:

1. There is a need for the proposed facility that requires the dredging that cannot be met by other similar facilities in reasonable proximity taking into account scope and purpose for the proposed facility;

2. There is no feasible alternative location for the proposed facility that requires the dredging, which would eliminate or reduce the amount of disturbance to intertidal and subtidal shallows without increasing impacts on other Special Areas; and

3. The proposed dredging and the facility that requires the dredging have been designed to minimize impacts to intertidal and subtidal shallows.

(d) Mitigation shall be required for the destruction of intertidal and subtidal shallows in accordance with (e) below. Mitigation proposals shall comply with the standards of N.J.A.C. 7:7E-3B. Mitigation shall not be required for the following:

1. Filling in accordance with N.J.A.C. 7:7E-4.10(c) and (e) 1, 2 and 3;
2. Maintenance dredging in accordance with N.J.A.C. 7:7E-4.6;
3. Beach nourishment in accordance with N.J.A.C. 7:7E-7.11(d);

4. *New Dredging in accordance with N.J.A.C. 7:7E-4.7 to a depth not to exceed four feet below mean low water; and*
5. *Construction of a replacement bulkhead in accordance with N.J.A.C. 7:7E-7.11(e)2i or ii.*

(e) Mitigation shall be required for the destruction of intertidal and subtidal shallows at a creation to last ratio of 1:1 through the creation of intertidal and subtidal shallows on the site of the destruction. For the purposes of this section, creation means excavating upland to establish the characteristics, habitat and functions of an intertidal and subtidal shallow. Where on-site creation is not feasible, mitigation shall be accomplished as follows:

2. *At a property other than a single family ;home or duplex property mitigation shall be performed in accordance with the following hierarchy:*

   i. *If on site creation of intertidal and subtidal shallows is not feasible, then mitigation shall be required at a creation to loss ratio of 1:1 through the creation of intertidal and subtidal shallows within the same 11-digit hydrologic unit code area, as defined at N.J.A.C. 7:7E-1.8, as the destruction;*
   ii. *If on site creation of intertidal and subtidal shallows is not feasible in accordance with (h)2i above, then mitigation shall be required at a creation to loss ratio of 1:1 through the creation of intertidal shallows within an adjacent 11-digit hydrologic unit code area within the same watershed management area, as defined at N.J.A.C. 7:7E-1.8, as the destruction. An adjacent 11-digit hydrologic unit code area is one which shares a common boundary at any point on the perimeter of the 11-digit hydrologic unit code area where the destruction is located;*
   iii. *If the creation of intertidal and subtidal shallows required in (h)2ii is not feasible, then mitigation*

shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a wetland system which was previously more ecologically valuable but has become degraded due to factors such as siltation, impaired tidal circulation, or contamination, with hazardous substances (degraded wetland system) on the site of the destruction. For the purposes of this section, enhancement means actions performed to improve the characteristics, habitat and functions of an existing degraded wetland;

iv. If the enhancement of degraded wetlands required in (h)2iii above is not feasible, then mitigation shall be required at an enhancement to loss ratio of 2:1 through the enhancement of a degraded wetland system within the same 11-digit hydrologic unit code area as the destruction;

v. If the enhancement of degraded wetlands required in (h)2v above is not feasible, then mitigation shall be required in accordance with either of the following:

(1) Creation of intertidal and subtidal shallows at a creation to lost ratio of 1:1 within the same watershed management area; or

(2) Enhancement of degraded wetlands at an enhancement to loss ratio 2:1 within the same watershed management area.

Impacts to intertidal and subtidal shallows in the project site appear to have been minimized. Approximately 150 sq. Ft of impacts to intertidal and subtidal shallows are proposed associated with the construction of a stormwater outfall pipe. The applicant proposes mitigation for this activity in the adjacent Oldmans Creek. In addition, to the impacts associated the outfall pipe there would be impacts from the placement of pilings and other pier support members in the water and shallows areas. This is further discussed under the Filling

Rule referenced later in this document. The mitigation proposal should detail the location of the proposed mitigation site on a plan drawn to scale with an accompanying mitigation plan. Accordingly, please address this item by submitting a detailed mitigation discussion and site plan.

7:7E-3.23 Filled Water's Edge

(a) Filled water's edge areas are existing filled areas lying between wetlands or water areas, and either the upland limits of fill, or the first paved public road or railroad landward of the adjacent water area, whichever is closer to the water. Some existing or former dredged material disposal sites and excavation fill areas are filled water's edge (see Appendix, Figure 4, incorporated herein by reference).

(b) The "waterfront portion" is defined as a contiguous area at least equal at least equal in size to the area within 100 feet of navigable water, measured from the Mean High Water Line (MHWL). This contiguous area must be accessible to a public road and occupy at least 30 percent of its perimeter along the navigable water's edge.

(c) On filled water's edge sites with direct water access (that is, those sites without extensive inter-tidal shallows or wetlands between the upland and navigable water), development shall comply with the following:
1. The waterfront portion of the site shall be:
i. Developed with a water dependent use, as defined at N.J.A.C. 7:7E-1.8;
ii. Developed with an at-grade deck provided:

(1) The deck is open to the general public;
(2) The use of the deck is water oriented;
(3) The deck is not enclosed; and
(4) A public walkway is provided around the deck landward of the mean high water line at the water's edge; or
iii. Left undeveloped for future water dependent uses;

2. On the remaining non-waterfront portion of the site, provision of additional area devoted to water dependent or water-oriented uses may be required as a special case at locations which offer a particularly appropriate combination of natural features and opportunity for waterborne commerce and recreational boating; and

3. On large filled water's edge sites, of about 10 acres or more upland acres, where water-dependant and water-oriented uses can co-exist with other types of development, a greater mix of land uses may be acceptable or even desirable. In these cases, a ;reduced waterfront portion, that is, less than provided by a 100-foot setback, may be acceptable provided that non-water related uses do not adversely affect either access to or use of the waterfront portion of the site.

2. For sites with an existing or pre-existing water dependent use other than a marina, development that would reduce or adversely affect the area currently or recently devoted to the water dependent use is discouraged.

(f) In waterfront areas located outside of the CAFEA zone the water dependent use may be a public walkway, provided the upland walkway right-of-way is at least 30 feet wide, unless there are existing onsite physical constrains which cannot be removed or altered to meet this requirement.

(g) The development shall comply with the requirements for impervious cover and vegetative cover that apply to the site under N.J.A.C. 7:7E-5 and either N.J.A.C. 7:7E-5A or 5B.

(h) Along the Hudson River and in other portions of the Northern Waterfront and Delaware River Region, where water dependent uses are deemed infeasible, some part of the waterfront portion of the site may be acceptable for non-water dependent development under the following conditions:

1. The development proposal addresses, as a minimum, past use of the site as well as potential for future water dependent, commercial, transportation, recreation, and compatible maritime support services uses;
2. The developed land uses closest to the closest to the water's edge are water oriented;
3. Currently active maritime port and industrial land uses are preserved;
4. Adverse impacts on local residents and neighborhoods are mitigated to the maximum extent practicable; and
5. All other coastal rules are met.

(f) On all filled water's edge sites, development must comply with the Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11). Public access to the waterfront will not be required at single family or duplex residential lots along the waterfront, which are not part of a larger development.

This Rule applies to construction above the mean high water line; therefore upland elements of the Crown Point Terminal project are subject to this Rule. The applicant has indicated that this Rule is not applicable, however based on the site history, it appears the subject land areas were once waters, wetlands or tidelands that were filled via the placement of dredged materials. Therefore, this Rule is applicable and must be addressed. It is recognized that port facilities are water dependent and therefore the water dependent component of the project is met. However, the project does not address or provide the Public Address to the Waterfront as required by this Rule. Moreover, the applicant has requested a "waiver" of this requirement. While public access to the waterfront may not be appropriate at core areas of this site due to security concerns, access could be provided at other portions of the site or at off-site locations. This is discussed further at the Public Access to the Waterfront Rule (N.J.A.C. 7:7E-8.11).

7:7E-3.27 Wetlands

This section of the Rule text has not been provided in this deficiency letter since there are companion Freshwater Wetlands permits pending with the Land Use Regulation Program. Notwithstanding the pending wetlands permits, the subject Waterfront Development Permit was not submitted with site development plans which depict the verified wetlands limits; associated buffer areas according to their respective resource classification and other plans as required by the Chapter 7 of the Coastal Permit Program Rules. Please supply all of the information indicated under Application Contents N.J.A.C. 7:7-4.2. Site plans must be supplied in accordance with sections 1 A through B and sections 1-10(f).

7:7E-3.28 Wetlands Buffers

Similar to the Wetlands Rule above, this section of the Rule has not been provided because there are companion Freshwater Wetlands Transition Area Waivers pending with the Land Use Regulation Program. As referenced above, however this application just include plans that detail buffers and transition area modifications in accordance with the Rule N.J.A.C. 7:7-4.2.

7:7E-3.38 Endangered or threatened wildlife or plant species habitats

(a) Endangered or threatened wildlife or plant species habitats are areas known to be inhabited on a seasonal or permanent basis by or to be critical at any stage in the life cycle of any wildlife or plan identified as "endangered" or "threatened" species on official Federal or State lists of endangered or threatened species, or under active consideration for State or Federal listing. The definition of endangered or threatened wildlife or plant species habitats in-

clude a sufficient buffer area to ensure continued survival of the population of the species. Absence of such a buffer area does not preclude an area from being endangered or threatened wildlife or plant species habitat.

1. Areas mapped as endangered or threatened wildlife species habitat on the Department's Landscape Maps of Habitat for Endangered, Threatened and Other Priority Wildlife (known hereafter as Landscape Maps) are subject to the requirements of this section unless excluded in accordance with (c)2 below. Buffer areas, which are part of the endangered or threatened wildlife species habitat, may extend beyond the mapped areas. The Department's Landscape Maps, with a listing of the endangered and threatened species within a specific area, are available from the Department's Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj/us/dep/fgw/ensphome.

2. Information on the areas mapped as endangered or threatened plant species habitat on the Department's Landscape Maps and the occurrence of endangered or threatened plant species habitat is available from the Department's Office of Natural Lands Management, Natural Heritage Database at PO Box 404, Trenton, New Jersey 08625-0404,

3. The required endangered or threatened wildlife or plant species habitat buffer area shall be based upon the home range and habitat requirements of the species and the development's anticipated impacts on the species habitat.

(b) Development of endangered or threatened wildlife or plant species habitat is prohibited unless it can be demonstrated, through an Endangered or Threatened Wildlife or Plant Species Impact Assessment as described at N.J.A.C. 7:7E-3C2, that endangered or threatened wildlife or plant species habitat would not directly or through secondary impacts on the relevant site or in the surrounding area be adversely affected.

(c) Applicants for development of sites that contain or abut areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps shall either:

1. Demonstrate compliance with this rule by conducting an Endangered or Threatened Wildlife Species Impact Assessment in accordance with N.J.A.C. 7:7E-3C2; or

2. Demonstrate that the proposed site is not endangered or threatened wildlife species habitat and this rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat Evaluation in accordance with N.J.A.C. 7:7E-3C3.

(d) If the Department becomes aware of an occurrence of an endangered or threatened wildlife species on a site that is not mapped as endangered or threatened plant species on a site that is not in the Natural Heritage Database, the Department will notify the applicant and the applicant shall demonstrate compliance with or inapplicability of this rule in accordance with (c) above.

(e) If the Department becomes aware of an occurrence of an endangered or threatened plant species on a site that is not in the Natural Heritage Database, the Department will notify the applicant and the applicant shall demonstrate compliance with this rule in accordance with (b) above.

(f) The Department is responsible for the promulgation of the official Endangered and Threatened Wildlife lists pursuant to the Endangered and Non-Game Species Conservation Act, N.J.S.A. 23:2A et seq. These lists include wildlife species officially listed as endangered and threatened in New Jersey as well as wildlife species officially listed as endangered or threatened pursuant to the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq. Because the lists are periodically revised by the Department in accordance with N.J.S.A. 23:2A-1 et seq., the lists are not published as part of this rule. The lists are found at N.J.A.C. 7:25-4.13 and 7:25-4.17, the rules adopted pursuant to the Endangered and Non-Game Species Conservation Act. To obtain a copy of the most current Endangered and Threat-

ened Wildlife lists, please contact the Department , Division of Fish and Wildlife, Endangered and Nongame Species Program at the Division's web address, www.state.nj.us/dep/fgw/ensphome, or by writing to the Division at PO Box 400, Trenton, New Jersey 08625-0400.

(g) The Department is responsible for promulgation of the official Endangered Plant Species List pursuant to N.J.S.A. 13:1B-15. The Endangered Plant Species List, N.J.A.C. 7:5C-5.1, includes plant species determined by the Department to be endangered in the State as well as plant species determined by the Department to be endangered in the State as well as plant species officially listed as endangered or threatened or under active consideration for Federal listing as Endangered or Threatened. Because the Endangered Plant Species List is periodically revised based on new information documented by the Department, it is not published as part of this rule. To obtain the most current Endangered Plant Species List, please contact the Department, Division of Parks and Forestry, Office of Natural Land Management, PO Box 404, Trenton, NJ 08625-0404.

(h) For sites located within the Pinelands National Reserve and the Pinelands Protection Area, the plant species listed in the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-6:24) are also considered endangered or threatened plant species.

(i) Rationale: See OAL Note at the beginning of this chapter.

The subject site has been identified as containing exceptional resource value wetlands via a Letter of Interpretation issued by the Department. This determination is based upon the western riverine portion of the site area containing bald eagle foraging habitat. The applicant has discussed this Rule and proposes to mitigate for certain temporary and secondary impacts to endangered Bald Eagle forested riparian buffer habitats located along the

Delaware River. The mitigation is proposed via planting of a forested buffer along Oldmans Creek shoreline on the southern boundary of the site. In order to address compliance with this Rule the applicant must specifically quantify the impacted area; the proposed mitigation area; provide a time schedule for the anticipated impacted area and mitigation creation area and identify the mitigation area including a metes and bounds survey. In addition, Sections 3 b and c of this Rule requires that applicants for development of sites that contain or abut areas mapped as endangered or threatened wildlife species habitat on the Landscape Maps shall either:

1. "Demonstrate compliance with this rule by conducting an Endangered or Threatened Wildlife Species Impact Assessment in accordance with N.J.A.C. 7:7E-3C.2; or

2. Demonstrate that the proposed site is not endangered or threatened wildlife species Habitat and this rule does not apply by conducting an Endangered or Threatened Wildlife Species Habitat Evaluation in accordance with N.J.A.C. 7:7E-3C.3"

Since the applicant has acknowledged the presence of bald eagle habitat onsite a wildlife species impact assessment must be provided in accordance the Rule at N.J.A.C. 7:7E-3.38(3)(b)(1).

7:7E-3.39 Critical wildlife habitats

(a) Critical wildlife habitats are specific areas known to serve an essential role in Maintaining wildlife, particularly in wintering, breeding, and migrating.

1. Rookeries for colonial nesting birds, such as herons, egrets, ibis, terns, gulls, and skimmers; stopovers for migratory birds, such as the Cape May Point region; and natural corridors for wildlife movement merit a special

management approach through designation as a Special Area.

Effective February 2, 2004

Note: This is a courtesy copy of the Costal Zone Management rules. The official version is in the New Jersey Administrative Code (N.J.A.C. 7:7E). Should there be any discrepancies between the courtesy copy and the official version, the official version will govern.

51

2. Ecotones, or edges between two types of habitats, are a particularly valuable critical wildlife habitat. Many critical wildlife habitats, such as salt marsh water fowl wintering areas, and muskrat habitats, are singled out as water or water's edge areas.

3. Definitions and maps of critical wildlife habitats are currently available only for colonial waterbird habitat in the 1979 Aerial Colony Nesting Waterbird Survey for New Jersey (NJDEP, Division of Fish and Wildlife). Until additional maps are available, sites will be considered on a case-by-case basis by the Division of Fish Wildlife.

(b) Development that would directly or through secondary impacts on the relevant site or in the surrounding region adversely affect critical wildlife habitats is discouraged, unless:

1. Minimal feasible interference with the habitat can be demonstrated;

2. There is no prudent or feasible alternative location for the development; and

3. The proposal includes appropriate mitigation measures.

(c) The Department will review proposals on a case-by-case basis.

(d) Rationale: See the note at the beginning of this Chapter.

The applicant has discussed this Rule indirectly via 7:7E-3.38 Endangered or threatened wildlife or

plant species habitats. However, the applicant has not depicted the specific critical wildlife habitat areas on a construction or site development plan and provided the analysis required at section (b) 1-3 of this Rule. This information must be provided in order to demonstrate compliance with this Rule.

7:7E-4.4 Docks and piers for cargo and commercial fisheries

(a) Docks and piers for cargo and passenger movement and commercial fisheries are Structures supported on pilings driven into the bottom substrate or floating on the water surface, used for loading and unloading passengers or cargo, including fluids, connected to or associated with, a single industrial or manufacturing facility or to commercial fishing facilities.

(b) Docks and piers for cargo and passenger movement and commercial fisheries are conditionally acceptable provided:

1. The width and length of the dock or pier is limited to only what is necessary for the proposed use;

2. The dock or pier will not pose a hazard to navigation. A hazard to navigation includes all potential impediments to navigation, including access to adjacent moorings, water areas and docks and piers; and

3. The associated use of the adjacent land meets all applicable Coastal Zone Management rules.

(c) The standards for port uses are found at N.J.A.C. 7:7E-7.9. The standards for the construction of a dock or pier composed of fill and retaining structures are found at N.J.A.C. 7:7E4.10.

This Rule requires that the length and width of a dock or pier be limited to only what is necessary for the proposed use. Accordingly, information including engineering and design parameters, which generated the sizing of the dock structure has been minimized. For example, dimensions of piers at

other LNG facilities should be provided for comparison. The applicants' response to this Rule may be limited to the portions of the pier located in New Jersey.

7E-4.7 New dredging

(a) New dredging is the removal of sediments that does not meet the definition of Maintenance dredging at N.J.A.C. 7:7E-4.6.

(b) New dredging is conditionally acceptable in all General Water Areas for boat moorings, navigation channels or anchorages provided:

1. There is a demonstrated need that cannot be satisfied by existing facilities;

2. The facilities served by the new dredging satisfy the location requirements for Special Water's Edge Areas;

3. The adjacent water areas are currently used for recreational boating, commercial fishing or marine commerce;

4. The dredge area causes no significant disturbance to Special Water or Water's Edge Areas;

5. The adverse environmental impacts are minimized to the maximum extent feasible;

6. The dredge area is reduced to the minimum practical;

7. The maximum depth of the newly dredged area shall not exceed that of the connecting access or navigation channel necessary for the vessel passage to the bay or ocean;

8. Dredging will have no adverse impacts on groundwater resources;

9. NO dredging shall occur within 10 feet of any wetlands. The proposed slope from this 10 foot buffer to the nearest edge of the dredged area shall not exceed three vertical to one horizontal; and

10. Dredging shall be accomplished consistent with all of the following conditions, as appropriate to the dredging method:

i. An acceptable dredged material placement site with sufficient capacity will be used. (See N.J.A.C. 7:7E-4.8 Dredged material disposal in water areas, and N.J.A.C. 7:7E-7.12 Dredged material placement on land);

ii. Pre-dredged chemical and physical analysis of the dredged material and/or its elutriate may be required where the Department suspects contamination of sediments. Additional testing, such as bioaccumulation and bioassay testing of sediments, may also be required as needed to determine the acceptability of the proposed placement site for the dredged material. The results of these tests will be used to determine if contaminants may be resuspended at the dredging site and what methods may be needed to control their escape. The results will also be used to determine acceptability of the proposed dredged material placement method and site;

iii. Turbidity concentrations (that is, suspended sediments) and other water quality parameters at, downstream, and upstream of the dredging site, and slurry water overflows shall meet applicable State Surface Water Quality Standards at N.J.A.C. 7:9B. The Department may require the permittee to conduct biological, physical and chemical water quality monitoring before, during, and after dredging and disposal operations to ensure that water quality standards are not exceeded;

iv. If predicted water quality parameters are likely to exceed State Surface Water Quality Standards, or if predredging chemical analysis of dredged material or elutriate reveals significant contamination, then the Department will work cooperatively with the applicant to fashion acceptable control measures and will impose seasonal restrictions under the specific circumstances identified at (b)11vii below;

v. For new dredging using mechanical dredges such as clamshell bucked, dragline, grab, or ladders, deploying silt curtains at the dredging site may be required, if feasible based on site conditions. Where the use of silt curtains is infeasible, dredging using closed watertight buckets or lat-

eral digging buckets may be required. The Department may decide not to allow mechanical dredging of highly contaminated sites even if turbidity control measures were planned;

vi. For hydraulic dredges, specific operational procedures designed to minimize water quality impacts, such as removal of cutter head, flushing of pipeline sections prior to disconnection, or limitations on depth of successive cuts, may be required;

vii. The Department may authorized dredging on a seasonally restricted basis only, in waterways characterized by the following:

(1) Known spawning, wintering or nursery areas of shortnose sturgeons, winter flounder, Atlantic sturgeon, alewife, blueback herring, striped bass or blue crab;

(2) Water bodies downstream of known anadromous fish spawning sites under N.J.A.C. 7:7E-3.5 Finfish migratory pathways, where the predicted turbidity plume will encompass the entire cross-sectional area of the water body, thus forming a potential blockage to upstream migration;

(3) Areas of contaminated sediments with high levels of fecal coliform and/or streptococcus bacteria, and/or hazardous substances adjacent to (upstream or downstream) State approved shellfishing waters and public or private bathing beaches; or

(4) Areas within 1,000 meters or less of oyster beds as defined in N.J.A.C. 7:7E-3.2; and

viii. Side slopes shall not be steeper than 3:1 adjacent to wetlands to prevent undermining and/or sloughing of the wetlands.

(c) Propwash dredging, which is the movement of sediment by resuspending accumulated material by scouring the bottom with boat propellers or specially designed equipment with propellers is prohibited.

(d) New dredging or excavation to create new lagoons for residential development is prohibited in wetlands,

N.J.A.C. 7:7E-3.27, wetlands buffer, N.J.A.C. 7:7E-3.28, endangered or threatened wildlife or vegetation species habitats, N.J.A.C. 7:7E-3.38, and discouraged elsewhere.

(e) New dredging is conditionally acceptable to control siltation in lakes, ponds and reservoirs, provided that an acceptable sedimentation control plan is developed to address re-sedimentation of these water bodies.

(f) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey, 08625-0420, (609) 777-1038.

(g) With the exception of N.J.A.C. 7:7E-4.7(b), (c), (d) and (e) above, new dredging is discouraged.

The dredging associated with this project is located outside of New Jersey's tidal waters, however, impacts associated with, or stemming from, dredging work are subject to State purview via certain CZM Rules. The applicant has indicated that this Rule is not applicable, however dredged material disposal via a hydraulic pipeline dredge is proposed within the State's boundary. Moreover, this application has been submitted without the requisite dredged material analysis as required by this Rule. Accordingly, a complete analytical report characterizing the subject sediment to be dredged must be submitted in order to address section 10 of this Rule. This material should be accompanied by the sediment core location plan that was approved by the Department. An evaluation of the data and determination of whether dredging impacts have been minimized will be made after review of pending comments from the Department's Division of Fish

and Wildlife; the National Marine Fisheries Service; the Federal Energy Regulatory Commission; the U.S. Coast Guard and other commenting agencies.

7:7E-4.8 Dredged material disposal

(a) Dredged material disposal is the discharge of sediments removed during dredging operations

(b) The standards relevant to dredged material disposal in water areas are as follows:

1. Dredged material disposal is prohibited in tidal guts, man-made harbors, medium rivers, creeks and streams, and lakes, ponds and reservoirs. Dredged material disposal is discouraged in open bays, semi-enclosed and backbays where the water depth is less than six feet;

2. Disposal of dredged materials in the ocean and bays deeper than six feet is conditionally acceptable provided that there is no feasible beneficial use or upland placement site available and it is in conformance with the USEPA and S Army Corps of Engineers Guidelines (40 C.F.R parts 220-228 and 230-232 and 33 CFR, parts 320-330 and 335-338) established under Section 404(b) of the Clean Water Act and the Evaluation of Dredged Material Proposed for Ocean Disposal Testing Manual, EPA-503/8-91/001, February 1991, and Evaluation of Dredged Material Proposed for Discharge in Inland and Near Costal Waters Testing Manual, EPA-000/0-93/000, May 1993, as appropriate to the proposed disposal site;

3. Dredged material disposal in water areas shall conform with applicable State Surface Water Quality Standards at N.J.A.C. 7:9B;

4. Overboard disposal (also known as aquatic, open water, side casting, subaqueous, or wet) of an uncontaminated sediments into unconfined disposal sites in existing anoxic dredge holes, shall comply with the following:

Effective February 2, 2004

Note: This is a courtesy copy of the Coastal Zone Management rules. The official version is in the New Jersey Ad-

ministrative Code (N.J.A.C. 7:7E). Should there be any discrepancies between the courtesy copy and the official version, the official version will govern.

93

i. Data on water quality, benthic productivity and seasonal finfish use demonstrate that the unconfined disposal site has limited biological value;

ii. All subaqueous dredged material disposal shall utilize best management techniques such as submerged elbows or underwater diffusers and may be limited to particular tidal cycle to further minimize impacts; and

iii. The hole shall not be filled higher than the depth of the surrounding waters.

5. Overboard disposal of sediments consisting of less than 90 percent sand shall be conditionally acceptable in unconfined disposal sites when shallow waters preclude removal to an upland or confined site. Such disposal shall comply with the following:

i. Shall fish Habitats (as defined in N.J.A.C. 7:&E-3.2) are not within 1,000 meters;

ii. Disposal will not smother or cause condemnation or contamination of harvestable shellfish resources (as in N.J.A.C 7:7E-3.2);

iii. Sediment characteristics of the dredged material and disposal site are similar; and

6. Uncontaminated dredged sediments with 75 percent sand or greater are generally encouraged for beach nourishment.

(c) The standards for dredged material placement on land are found at N.J.A.C 7:7E-7.12.

(d) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The

manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, new Jersey, 08625-0420, (609) 777-1038.

(e) Rationale: See the note at the beginning of this Chapter.

This Rule principally addresses dredge material disposal in water areas. Please refer to the Rule at N.J.A.C 7:7E-7.12 – Dredged Material Placement on Land discussed later in the letter.

7:7E-4.10 Filling

(a) Filling is the deposition of material including, but not limited to, sand, soil, earth and dredged material, into water areas for the purpose of raising water bottom elevations to create land areas.

(b) Filling is prohibited in lakes, ponds, reservoirs and open by areas at greater than 18 feet as defined at N.J.A.C 7:7-E4.1, unless the filling is consistent with the Freshwater Wetlands Protection Act (N.J.A.C. 13:9B-1 et seq.) and Freshwater Wetlands.

Approximately 340-sq. ft. of fill for the construction of a storm water outfall structure is proposed. In addition, an unspecified amount of fill will result from the piles that will support the proposed dock. The area of disturbance to waters, intertidal and subtidal shallows associated with the pilings and other pier supports must be quantified and mitigated. Accordingly, compliance with Rule must be demonstrated by suitable mitigations for the subject fills.

7:7E-4.14 Submerged pipelines

(a) Submerged pipelines (pipelines) are underwater pipelines which transmit liquids or gas, including crude oil, natural gas, water petroleum products or sewerage.

(b) Submerged pipelines are conditionally acceptable provided:

1. The pipelines are not sited within Special Areas, unless no prudent and feasible alternate route exists;

2. Directional drilling is used unless it is demonstrated that the sue of directional drilling is not feasible;

3. The pipeline is buried to a sufficient depth to avoid exposure or hazard;

4. All trenches are backfilled to preconstruction depth with natural occurring sediment; and

5. The proposed developments has been designed to minimize the impacts to the water area.

(c) Rationale: See the note at the beginning of this Chapter.

The applicant proposes to hydraulically convey dredged material to an off-site disposal location via pipeline. This Rule has not been fully addressed as no details have been given concerning this activity. Specifically, the rout and location of the pipe must be given as well details of its size and method of traverse (i.e., suspended, submerged) must be provided. Based on a review of river chards the length of the pipeline will exceed 3.5 miles and the pipeline will cross outshore of Raccoon Creek. Since the pipe will be located in and will cross navigable waters, it must be routed so that it will not interfere with navigation. In addition, the applicant has not been identified if the pipe will traverse wetlands, buffers and other Special areas as it makes landfall. Finally, this dredge pipeline will convey a very large quantity of dredge slurry, which may contain contaminants. Accordingly, a discussion along with supporting pipeline specifications must be provided demonstrating that the pipeline will be deployed and maintained such that it will not release or leak slurry into the river or wetlands. Moreover, plan should be provided for the detection of any leaks in submerged portions of the pipe. In addition, since the project calls for ongoing maintenance dredging, the applicant must identify

the method and details of future dredging cycles. If a hydraulic pipeline dredge will be used for subsequent operations the duration of work and effects of the pipeline route must also be addressed.

SUBCHAPTER 5

IMPERVIOUS COVER LIMITS AND VEGETATIVE COVER PERCENTAGES IN THE UPLAND WATERFRONT DEVELOPMENT AREA

7:7E-5A.1 Purpose and Scope

This subchapter sets the impervious cover limits and vegetative cover percentages for sites in the upland waterfront development area, as defined at N.J.A.C. 7:7E-5.2. For a site in the upland waterfront development area, impervious cover limits and vegetative cover percentages are based on the growth rating, environmental sensitivity, and development potential, and on whether the site is forested or unforested.

7:7E-5A.2 Upland waterfront development area regions and growth ratings

(a) The growth rating for a site in the upland waterfront development area is determined by the region in which it is located, and the growth rating assigned to that region.

(b) The growth ratings are as follows:

1. A development growth rating is assigned to regions of the upland waterfront development area that are already largely developed. Development in regions with this growth rating is preferred over development in regions with limited growth and extension growth ratings;

(c) The eight different regions and their growth ratings are based on their respective patterns of development and cultural and natural resources.

(d) The regions are as follows:

7. The Delaware River region, which is:

i. The land within the upland waterfront development area in the municipalities of Bridgeton and Millville in Cumberland County and Salem in Salem County; and

ii. The land within the upland waterfront development area in Salem County (but not located in the Delaware estuary region), and extending north from Salem County through Gloucester County, Camden County, Burlington County (but not located in Bass River Township), and Mercer County; and

8. The Delaware estuary region, which is:

i. The land within the upland waterfront development area in Cumberland County (but not located in the municipalities of Bridgeton and Millville); and

ii. The land within the upland waterfront development area in Salem County that is south and east of a boundary formed by Interstate 295 from its intersection with the New Jersey Turnpike to County Route 641; County Route 641 from its intersection with the New Jersey Turnpike to U.S. Route 130; U.S. Route 130 from its intersection with County Route 641 to its intersection with Oldmans Creek (but not located within the municipality of Salem).

(e) The growth ratings assigned to the regions described in (d) above are as follows:

1. The following regions are assigned a development growth rating:

i. Urban area region;

ii. Northern waterfront region; and

iii. Delaware River region;

2. The following regions are assigned an extension growth rating:

i. Western ocean region; and

ii. Southern region; and

3. The following regions are assigned a limited growth rating:

i. Western ocean region; and

ii. Great Egg Harbor River region; and

iii. Delaware estuary region.

7:7E-5A.3 Environmental sensitivity

(a) The environmental sensitivity of a site is based on the soil type and the depth to seasonal high water table or the presence of paving or structures. Different portions of a site may have different environmental sensitivities.

(b) A site or portion of a site has a high environmental sensitivity if it has wet or high permeability moist soils.

1. Wet or high permeability moist soils are soils with a depth to seasonal high water table of three feet or less, unless the soils are loamy sand or coarser as defined by the United States Department of Agriculture's Soil Texture Triangle, in which case they are soils with a depth to seasonal high water table of four feet or less.

(c) A site or portion of a site has a medium environmental sensitivity if it has neither a high environmental sensitivity nor a low environmental sensitivity.

(d) A site or portion of a site has a low environmental sensitivity if the depth to seasonal high water table is greater than five feet, or the site or portion of the site has paving or structures at the time the application is submitted.

7:7E-5A.4 Development potential

(a) Development potential is determined by the type of development proposed and the presence or absence of certain development-oriented elements at or near the site of the proposed development, including roads; wastewater conveyance, treatment and disposal system; and existing development. Development potential may be high, medium or low, as determined under N.J.A.C. 7:7E-5A.5 through 5A.7. A single development potential applies to an entire site.

(b) If a development proposed on a site is inconsistent with the applicable Areawide Water Quality Management Plan

adopted under N.J.A.C. 7:15, the development potential cannot be determined for the site. Any development that is inconsistent with the applicable Areawide Water Quality Management Plan is prohibited under N.J.A.C. 7:7E-8.4(b).

(c) The types of development are:

2. Major commercial or industrial development, which includes all industrial development, warehouses, offices, manufacturing plants, energy facilities, wholesale and major shopping centers with more than 100,000 square feet of enclosed building area, and major parking facilities with more than 700 parking spaces. For the purposes of this section and N.J.A.C. 7:7E-5A.6, major commercial or industrial development also includes solid waste facilities and wastewater treatment plants; and

3. Campground development, which provides facilities for visitors to enjoy the natural resources of the State. Typically, this type of development is suited to sites somewhat isolated from other development and with access to water, beach, forest and other natural amenities.

(d) The development potential for a site shall be determined as follows:

1. If a proposed development is a residential or minor commercial development as described at (b)1 above, the development potential for the site is determined under N.J.A.C. 7:7E-5A.5;

2. If a proposed development is a major commercial or industrial development as described at (b)2 above, the development potential for the site is determined under N.J.A.C. 7:7E-5A.6; and

7:7E-5A.6 Development potential for a major commercial or industrial development site

(a) Subject to the limitations at N.J.A.C. 7:7E-5A.4(c)4, the development potential for a major commercial or industrial development site is determined under (b) through (d) below.

(b) A site upon which a major commercial or industrial development is proposed is a high development potential site if it meets all of the requirements at (b)1 through 4 below:

1. An existing paved public road abuts the site;

2. If an offsite wastewater conveyance, treatment and disposal system is to be used:

i. The existing conveyance component of the system abuts the site; and

ii. The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity;

3. A part of the perimeter of the site is adjacent to, or immediately across a paved road from, existing major commercial or industrial development, or, in a region with a development growth rating, the site is adjacent to or immediately across a paved road from any existing commercial development; and

4. In a region with a limited growth or extension growth rating, the site is located either:

i. For a major commercial development, within two miles of an existing intersection with a limited access highway; or

ii. For an industrial development, either within:

(1) Two miles of an existing intersection with a limited access highway; or

(2) One-half mile of a freight rail line that shall be used, or the applicant has a written agreement with the owner of a freight rail line to obtain freight rail service directly to the site.

(c) A site upon which a major commercial or industrial development is proposed is a medium development potential site if it is not a high development potential site under

(b) above but does meet the requirements at either (c)1 or 2 below:

1. The site is located in a region with a development growth rating and the site is located;

i. One thousand feet or less from the nearest existing paved public road that is approved and shall be constructed before or concurrently with the development;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the conveyance component of that system, or 1,000 feet or less from the conveyance component of a system that is approved and shall be constructed before or concurrently with the development, provided:

(1) The wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. For an industrial development, one-half mile or less from the nearest existing commercial or industrial development that has more than 50,000 square feet of enclosed building areas within a single facility; or

2. The site is located in a region with limited growth or extension growth rating and the site is located:

i. Either 1,000 feet or less from the nearest existing paved public road, or five miles or less from the nearest intersection with a limited access highway;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the existing conveyance component of the system, provided:

(1) The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. One-half mile or less from the nearest commercial or industrial development that has more than 50,000 square feet of enclosed building area within a single facility.

(d) A site upon which a major commercial or industrial development is proposed is a low development potential site if it is neither a high development potential site under (b) above nor a medium development potential site under (c) above.

(1) The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity;

iii. If a commercial development is proposed, one-half mile or less from the nearest existing commercial or industrial development that has more than 20,000 square feet of enclosed building area within a single facility; and

iv. If a residential development is proposed, one-half mile or less from developed land, as described at (b)3 above.

(d) A site upon which a residential or minor commercial development is proposed is a low development potential site if it is neither a high development potential site under (b) above nor a medium development potential site under (c) above.

7:7E-5A.6 Development potential for a major commercial or industrial development site

(a) Subject to the limitations at N.J.A.C 7:7E-5A.4(c)4, the development potential for a major commercial or industrial development site is determined under (b) through (d) below.

(b) A site upon which a major commercial or industrial development is proposed is a high development potential site if it meets all of the requirements a (b)1 through 4 below:

1. An existing paved public road abuts the site;

2. If an offsite wastewater conveyance, treatment and disposal system is to be used:

i. The existing conveyance component of the system abuts the site; and

ii. The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity;

3. A part of the perimeter of the site is adjacent to, or immediately across a paved road from, existing major commercial or industrial development, or, in a region with a development growth rating, the site is adjacent to or immediately across a paved road from any existing commercial development; and

4. In a region with a limited growth or extension growth rating, the site is located either:

i. For a major commercial development, within two miles of an existing intersection with a limited access highway; or

ii. For an industrial development, either within:

(1) Two miles of an existing intersection with a limited access highway; or

(2) One-half mile of a freight rail line that shall be used, or the applicant has a written agreement with the owner of a freight line to obtain freight rail service directly to the site.

(c) A site upon which a major commercial or industrial development is proposed is a medium development potential site if it is not a high development potential site under (b) above but does meet the requirements at either (c)1 or 2 below:

1. The site is located in a region with a development growth rating and the site is located:

i. One thousand feet or less fro the nearest existing paved public road, or 1,000 feet or less from the nearest public

road that is approved and shall be constructed before or concurrently with the development;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the conveyance component of that system, or 1,000 feet or less from the conveyance component of a system that is approved and shall be constructed before or concurrently with the development, provided:

(1) The wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant has an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. For an industrial development, one-half mile or less from the nearest existing commercial or industrial development that has more than 50,000 square feet of enclosed building area within a single facility; or

2. The site is located in a region with a limited growth or extension growth rating and the site is located:

i. Either 1,000 feet or less from the nearest existing paved public road, or five miles or less from the nearest intersection with a limited access highway;

ii. If an offsite wastewater conveyance, treatment and disposal system is to be used, 1,000 feet or less from the existing conveyance component of the system, provided:

(1) The existing wastewater conveyance, treatment and disposal system has adequate capacity to convey, treat, and dispose of the sewage from the proposed development, or the applicant ahs an agreement with the sewage authority to modify the system to provide adequate capacity; and

iii. One-half mile or less from the nearest commercial or industrial development that has more than 50,000 square feet of enclosed building area within a single facility.

(d) A site upon which a major commercial or industrial development is proposed is a low development potential site if it is neither a high development potential site under

(b) above nor a medium development potential site under (c) above.

7:7E-5A.8 Development intensity

(a) The development intensity for a site is based on growth rating, environmental sensitivity, and development potential. Tables A through C are used to determine the development intensity of a site or portion of a site. Because environmental sensitivity may be different for different portions of a site, development intensity can also be different for different portions of a site.

(b) To determine the development intensity for a site:

1. Determine the growth rating for the site under N.J.A.C. 7:7E-5A.2;

2. Determine the environmental sensitivity for each portion of the site under N.J.A.C. 7:7E-5A.3;

3. Determine the development potential for the site based on the site and the type of development under N.J.A.C. 7:7E-5A.4 through 5A.7;

4. Consult Table A, B, or C below as follows:

i. For a site with a development growth rating, consult Table A; (See Attachment A)

The applicant has reported that the Crown Landing site is comprised of a total land area of 162.4 acres within the waterfront development area. The net land area reported (subtracting wetlands and wetlands transition areas) is 37.9 acres. The growth area of the site is the Delaware River Region, and therefore it is a designated Development Region for Coastal growth.

The Environmental Sensitivity of the site is derived based on soil types and their respective depths to the seasonal high water tables. The applicant has determined the site as containing two environmental sensitivities based on seasonal high water table levels. However, the applicant has not pro-

vided the pezometers or core logs which where used to determine the environmental sensitivity of the site. Furthermore, the extent of the 26.9 acres of medium environmental sensitive area and 11.0 acres of high sensitivity areas were not delineated and shown on a site development plan. This section of the Rule and supporting data establish the criteria for which the development intensity and allowable impervious cover limits are based. Therefore, this information bust be elucidated and provided in order to enable the Department to determine compliance with this Rule.

In addition, section 7:7E-5A.10 Vegetative Cover Percentages for a Site in the Upland Waterfront Development Area requires that trees and or herb/shrub vegetation shall be planted or preserved on-site. This section of the Rules was not addressed in the statement of compliance. Accordingly, this section of the Rule must be addressed via an analysis of the Vegetative Cover Percentages and submitted with the calculations.

7:7E-7.4 Energy facility use rule

(a) Energy facilities include facilities, plants or operations for the production, conversion, exploration, development, distribution, extraction, processing, or storage of energy or fossil fuels. Energy facilities also include onshore support bases and marine terminals. Energy facilities do not include operations conducted by a retail dealer, such as a gas station, which is considered a commercial development.

(b) Standards relevant to siting of new energy facilities, including all associated development activities, are as follows:

1. Energy facilities shall not be sited in Special Areas as defined at N.J.A.C. 7:7E-3.1 through 3.42, 3.44, 3.46, and marine fish and fisheries areas defined at N.J.A.C 7:7E-

8.2, unless site-specific information demonstrates that such facilities will not result in adverse impacts to these areas;

2. Except for water dependent energy facilities, energy facilities shall be sited at least 500 feet inland of the mean high water line of tidal waters in the following areas:

i. The CAFRA area; and

ii. The Western Ocean, Southern, Mullica-Southern Ocean, Great Egg Harbor River and Delaware Estuary regions, as defined at N.J.A.C. 7:7E-5A.2(d);

3. Public access to and use of the waterfront and tidal waters shall be maintained and, where feasible, enhanced in the siting of energy facilities, pursuant to N.J.A.C. 7:7E-8.11; and

4. The scenic and visual qualities of coastal areas shall be maintained as important public resources in the siting of energy facilities, pursuant to N.J.A.C. 7:7E-8.12.

(c) Coastal energy facilities construction and operation shall not directly or indirectly result in net loss of employment in the State for any single year.

1. Coastal energy facility construction and operation which results in loss of 200 or more person-years of employment in jobs in New Jersey directly or indirectly related to the State's coastal tourism industry in any single year is prohibited.

2. Rationale: See note at the beginning of this Chapter.

(i) Standards relevant to pipelines and associated facilities are as follows:

1. Crude oil and natural gas pipelines to bring hydrocarbons from offshore of the New Jersey coast to existing refineries, oil and gas transmission and distribution systems, and other new oil and natural gas pipelines are conditionally acceptable, provided:

i. For safety an conservation of resources, the number of pipeline corridors, including trunk pipelines for natural gas and oil, shall be limited, to the maximum extent feasi-

ble, and designated following appropriate study and analysis by interested Federal, State and local agencies, affected industries, and the general public;

Standards relevant to call processing plants are as follows:

1. A "gas processing plant" is designed to recover liquefiable hydrocarbons from a gas stream before it enters a commercial transmission line. A gas processing facility may include treatment, recovery and fractionation equipment to separate the recovered liquid hydrocarbon stream into its various components including, for example, ethane, butane and propane.

2. Gas processing plants proposed for locations between the offshore pipeline landfall and interstate natural gas transmission lines shall be prohibited from sites within the CAFRA area and shall be located the maximum distance from the shoreline. The siting of gas processing plants will be reviewed in terms of the total pipeline routing system.

3. Rationale: See the note at the beginning of this Chapter.

(n) Standards relevant to other gas-related facilities are as follows:

1. Additional facilities related to a natural gas pipeline such as metering and regulating stations, odorization plants, and block valves are conditionally acceptable in the CAFRA area if adequate visual, sound, and vegetative buffer areas are provided.

2. Rationale: See the note at the beginning of this Chapter.

(p) Standards relevant to storage of crude oil, gases and other potentially hazardous liquid substances are as follows:

1. The storage of crude oil, gases and other potentially hazardous liquid substances as defined in N.J.A.C. 7:1E-1.1 under the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.) is prohibited on barrier islands and discouraged elsewhere in the CAFRA area.

2. The storage of crude oil, gases and other potentially hazardous liquid substances is conditionally acceptable in the Urban Area, Northern Waterfront and Delaware River regions if it is compatible with or adequately buffered from surrounding uses.

3. The storage of crude oil, gases and other potentially hazardous liquid substances is not acceptable where it would limit or conflict with a potential recreational use.

4. The storage of crude oil, gases and other potentially hazardous liquid substances is not acceptable along the water's edge unless the storage facility is supplied by ship, in which case it is acceptable on the filled water's edge provided the storage facility complies with (p)1, 2, and 3 above.

5. Rationale: See the note at the beginning of this Chapter.

(q) Standards relevant to tanker terminals are as follows:

1. New or expanded tanker facilities are acceptable only in existing ports and harbors where the required channel depths exist to accommodate tankers.

i. Multi-company use of existing and new tanker terminals is encouraged in the Port of New York and New Jersey and the Port of Camden and Philadelphia, where adequate infrastructure exists to accommodate the secondary impacts which may be generated by such terminals, such as processing and storage facilities.

2. New tanker terminals are discouraged in areas not identified in (q)1 above.

3. Offshore tanker terminals and deepwater ports are discouraged.

4. Rationale: See the note at the beginning of this Chapter.

(s) Standards relevant to liquefied natural gas (LNG) facilities are as follows:

1. New marine terminals and associated facilities that receive, store, and vaporize liquefied natural gas for transmission by pipeline are discouraged in the coastal zone

unless a clear and precise justification for such facilities exists in the national interest; the proposed facility is located an constructed so as to neither unduly endanger human life and property, nor otherwise impair the public health, safety and welfare, as required by N.J.S.A. 13:19-10f; and such facilities comply wit the Coastal Zone Management rules.

i. LNG facilities shall be sited and operated in accordance with the standards set forth in the Natural Gas Act of 1938, 15U.S.C. 717-717x, the Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq., the Energy Policy Act of 1992, P.L. 102-486, 106 Stat. 2776, October 24, 1992, and the National Environmental Policy Act, 42 U.S.C. 4321 et seq., which set forth standards for siting, design, installation, inspection, testing, construction, operation, transportation of gas, replacement, and maintenance facilities.

ii. In determining the acceptability of proposed LNG facilities the Department will consider siting criteria including but not limited to:

(1) The risks inherent in tinkering LNG along New Jersey's waterways;

(2) The risks inherent in transferring LNG onshore; and

(3) The compatibility of the facility with surrounding land uses, population densities, and concentrations of commercial or industrial activity.

iii. New LNG facilities that liquefy, store and vaporize LNG to serve demand during peak periods shall be located in generally remote, rural, and low-density areas where land use controls and/or buffer zones are likely to be maintained.

The Compliance Statement supplied by applicant refers to sections of other documents such as the numerous Resource Reports. Supporting documents should be referenced or attached to facilitate agency and public review. In accordance with this Rule a detailed analysis specific to the LNG opera-

tion in New Jersey, the must be provided to enable the Department to determine compliance with section S (II) 1, 2, 3 this Rule. This must include a demonstration that the storage and vaporizing facilities be located in areas where land use controls and or buffer zones are likely to be maintained. This information would be best supported by a zoning analysis and other land use parameters. In addition, the following items from the Crown Landing LLNG Project Resource Report 11 - Safety and Reliability and other referenced documents must be provided and or addressed:

1. Page 11-12 – please provide the Resource Report 13 (Additional Information Related to LNG Plants).
2. Page 11-15 – provide a mapping of the calculated or modeled Thermal Exclusion Zones for this site.
3. Section 11.2.4 – provide worst-case scenario pool fire models for the Crown Landing LNG site.
4. Section 11.2.5.1 – provide the Environmental Resource Report dated September 2004, (U.S. Dept of Energy study on safety of LNG shipping which was scheduled for release in November 2004).
5. Page 11-7 – provide an analysis of rapid phase transition for subsurface releases of LNG at the project site modeling maximum warm season river conditions and various tide stages.
6. Page 11-7 – provide the Hazards Identification Study (RRS, 2003).
7. Section 11.2.5.1 – provide the FERC ABS Study entitled "Consequence Assessment Methods of Incidents Involving Releases from LNG Carriers" (draft released 5/13/04).

8. **Page 11-10 - provide the US Coast Guard defined zone surrounding the LNG ships during transit to and loading at the facility. And address this with the respect to recreational boating and fishing at the subject reach of the Delaware River.**
9. **Page 11-11 - provide the USCG letter of recommendation (if available).**
10. **Page 11-13 - provide the Lloyds 2002 and the University of Houston 2003 studies.**
11. **Page 11-18 - discusses a proposed mooring study for stability during extreme winds. This work should be done in advance of the project. Please discuss or provide the study.**
12. **Page 11-19 - discuss why a ten-minute release was selected as adequate in terms of containing spilled LNG.**
13. **Page 11-19 - depict exclusion zones.**
14. **Page 11-20 - provide a delineation of the modeled vapor dispersion zones for the subject site.**

7:7E-7.12 Dredged material placement on land

(a) Dredged material placement is the disposal or beneficial use of sediments removed during dredging operations. Beneficial uses of dredged material include, but are not limited to, fill, topsoil, bricks and lightweight aggregate. This rule applies to the placement of dredged material landward of the spring high water line. The standards for dredged material disposal in Water Areas are found at N.J.A.C. 7:7E-4.8.

(b) Dredged material placement on land is conditionally acceptable provided that the use is protective of human health, groundwater quality, and manages ecological risks. Testing of the dredged material may be required as needed to determine the acceptability of the placement of the material on a particular site.

(c) Dredged material disposal is prohibited on wetlands unless the disposal satisfies the criteria found at N.J.A.C. 7:7E-3.27.

(d) The use of dredged material of appropriate quality and particle size for purposes such as restoring landscape, enhancing farming areas, capping and remediating landfills and brownfields, beach protection, creating marshes, capping contaminated dredged material disposal areas, and making new wildlife habitats is encouraged.

(e) Effects associated with the transfer of the dredged materials from the dredging site to the disposal site shall be minimized to the maximum extent feasible.

(f) Dredged material disposal in wet and dry borrow pits is conditionally acceptable (see N.J.A.C. 7:7E-3.14, and 3.35).

(g) If pre-dredging sediment analysis indicated contamination, then special precautions shall be imposed including but not necessarily limited to increasing retention time of water in the disposal site or rehandling basin through weir and dike design modifications, use of coagulants, ground water monitoring, or measures to prevent biological uptake by colonizing plants.

(h) All potential releases of water from confined (diked) disposal sites and rehandling basins shall meet existing State Surface Water Quality Standards (N.J.A.C. 7:9B) and State Groundwater Quality Standards (N.J.A.C. 7:9).

(i) The Department has prepared a dredging technical manual, titled "The Management and Regulation of Dredging Activities and Dredged Material Disposal in New Jersey's Tidal Waters," October 1997, which provides guidance on dredged material sampling, testing, transporting, processing, management, and placement. The manual is available from the Department's Office of Maps and Publications, PO Box 420, Trenton, New Jersey, 08625-0420, (609) 777-1038.

As discussed previously under the Rules on New Dredging, this application has been submitted

without the dredged material analysis as required by this Rule. Accordingly, a complete analytical report characterizing the subject sediment to be dredged must be submitted in order to address this Rule. This material must be submitted in accordance with the Department's guidance entitled: "The Management and Regulation of Dredging and Dredge Material Disposal in New Jersey's Tidal Waters, October 1997".

An evaluation of the data and a determination of whether dredging impacts comply with this Rule will be made after review of pending comments from the Department's Division of Fish and Wildlife; the National Marine Fisheries Service; the Federal Energy Regulatory Commission; U.S. Coast Guard and other commenting agencies. In addition, in order to address acceptability of the material for placement, a letter of acceptance from Weeks Marine or any other party accepting the material must be provided as required under the Rule on New Dredging 7:7E-4.7(10)(I).

SUBCHAPTER 8. RESOURCE RULES

7:7E-8.1 Purpose and scope

(a) In addition to satisfying the location and use rules, a proposed development must satisfy the requirements of this subchapter. This subchapter contains the standards the Department utilizes to analyze the proposed development in terms of its effects on various resources of the built and natural environment of the coastal zone, both at the proposed site as well as in its surrounding region.

7:7E-8.2 Marine Fish and Fisheries

(a) Marine fish are marine and estuarine animals other than marine mammals and birds. Marine fisheries means:

1. One or more stocks of marine fish which can be treated as a unit for the purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational and economic characteristics; and

2. The catching, taking or harvesting of marine fish.

(b) Any activity that would adversely impact on the natural functioning of marine fish, including the reproductive, spawning and migratory patterns or species abundance or diversity of marine fish, is discouraged. In addition, any activity that would adversely impact any New Jersey based marine fisheries or access thereto is discouraged, unless it complies with (c) below.

(c) The following coastal activities are conditionally acceptable provided that the activity complies with the appropriate general water area rule(s) at N.J.A.C. 7:7E-4:

1. Construction of submerged cables and pipelines;

2. Sand and gravel mining to obtain material for beach nourishment, provided:

i. The beach nourishment project is in the public interest;

ii. There are no alternative borrow sites that would result in less impact to marine fish and fisheries;

iii. Any alteration of existing bathymetry within Prime Fishing areas, as defined at N.J.A.C. 7:7E-3.4, does not reduce the high fishery productivity of these areas; and

iv. Measures are implemented to minimize and compensate for impacts to marine fish and fisheries; and

3. The establishment of Aquaculture Development Zones in accordance with N.J.A.C. 4:27-1 et seq. and any regulations developed and adopted pursuant thereto.

Impacts to the identified fish habitats will occur as a result of the pier structure; associated shading; the placement of pilings constituting fills in water areas; hydroacoustic impacts and ballast water withdrawn. Some of the associated physical disturbances and impacts are proposed to be miti-

gated by the creation of an intertidal and subtidal mitigation area. As state earlier, NJDEP Division of Fish and Wildlife indicated that ship ballast and tank hydrostatic test water withdrawals may adversely impact on the natural functioning of marine fish, including the reproductive, spawning and migratory patterns or species abundance. Accordingly, in order to enable the Department to determine compliance with these Rule additional detailed information bust be provided quantifying impacts to marine fish and fisheries that may occur as a result of the construction and operation of the Crown Landing LNG facility. This submission should contain all relevant alternatives for the avoidance and minimization of impacts and a report of agency input concerning avoidance and mitigative measures.

7:7E-8.7 Stormwater management

If a project or activity meets the definition of "major development" at N.J.A.C. 7:8-1.2, then the project or activity shall comply with the Stormwater Management rules at N.J.A.C. 7:8

The statement of compliance submitted with this application contains a stormwater management plan. The office is awaiting review comments on this information.

7:7E-8.8 Vegetation

(a) Vegetation is the plant life or total plant cover that is found on a specific area, whether indigenous or introduced by humans.

(b) Coastal development shall preserve, to the maximum extent practicable, existing vegetation within a development site. Coastal development shall plant new vegetation, particularly appropriate coastal species native to New Jersey to the maximum extent practicable.

This Rule requires preservation, to the maximum extent practicable, of existing vegetation and the planting of new native vegetation. A vegetation site plan should be submitted indicating the existing vegetation types and depicting native coastal species to be plated. This plan should show all areas to remain undisturbed as well as restoration areas.

7:7E-8.10 Air quality

(a) The protection of air resources refers to the protection from air contaminants that injure human health, welfare or property, and the attainment and maintenance of State and Federal air quality goals and the prevention of degradation of current levels of air quality.

(b) Coastal development shall conform to all applicable State and Federal regulations, standards and guidelines and be consistent with the strategies of New Jersey's State Implementation Plan (SIP). See N.J.A.C. 7:27 and New Jersey SIP for ozone, particulate matter, sulfur dioxide, nitrogen dioxide, carbon monoxide, lead, and visibility.

(c) Coastal development shall be located and designed to take full advantage of existing or planned mass transportation infrastructures and shall be managed to promote mass transportation services, in accordance with the Traffic rule, N.J.A.C. 7:7E-8.14.

(d) Rationale: See the note at the beginning of the Chapter.

This rule requires that coastal development projects be consistent with the strategies of New Jersey's State Implementation Plan (SIP), and this includes construction activities. The proposed construction activities are within nonattainment areas for 8-hour ozone and PM 2.5. Mitigation measures for emissions associated with the project construction need to be discussed with the Bureau of Air Quality Planning. In addition, there is a Precon-

struction Permit application (ID # 55971) pending with the Bureau of Preconstruction permitting which is under review. A final determination of compliance with this Rule will be based upon recommendations and or the issuance of an Air Permit.

7:7E-8.11 Public Access to the Waterfront

(a) Public access to the waterfront is the ability of all members of the community at large to pass physically and visually to from and along the ocean shore and other waterfronts.

(b) Coastal development adjacent to all coastal waters, including both natural and developed waterfront areas, shall provide permanent perpendicular and linear access to the waterfront to the maximum extent practicable, including both visual and physical access. Development that limits public access and the diversity of the waterfront experiences is discouraged.

1. All development adjacent to water shall, to the maximum extent practicable, provide, within its site boundary, a linear waterfront strip accessible to the public. If there is a linear waterfront accessway on either side of the site and the continuation of which is not feasible within the boundaries of the site, a pathway around the site connecting to the adjacent parts, or potential parts of the waterfront path system in adjacent parcels shall be provided.

3. Public access must be clearly marked, provide parking where appropriate, be designed to encourage the public to take advantage of the waterfront setting, and must be barrier free where practicable.

4. A fee for access, including parking where appropriate, to or use of publicly owned waterfront facilities shall be no greater than that which is required to operate and maintain the facility and must not discriminate between residents and non-residents except that municipalities may set a fee schedule that charges up to twice as much to nonresi-

dents for use of marinas and boat launching facilities for which local funds provided 50 percent or more of the costs.

5. All establishments, including marinas and beach clubs, which control access to tidal waters shall comply with the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

6. Public access, including parking where appropriate, shall be provided to publicly funded shore protection structures, beaches nourished with public funds and to waterfronts created by public projects unless such access would create a safety hazard to the user. Physical barriers or local regulations which unreasonably interfere with access to, along or across a structure or beach are prohibited.

10. Development elsewhere in the coastal zone shall conform with any adopted municipal, county or regional waterfront access plan, provided the plan is consistent with the Coastal Zone Management rules.

11. The Department may require some or all of the public access portion of a site to be dedicated for public use through measures such as a conservation restriction.

12. Development adjacent to coastal waters shall provide fishing access within the provision of public access wherever feasible and warranted.

13. Development adjacent to coastal waters shall provide barrier free access within the provisions of public access wherever feasible and warranted by the characteristics of the access area.

14. For developments which reduce existing on-street parking that is used by the public for access to the waterfront, mitigation for the loss of these public parking areas is required at a minimum of 1:1 within the proposed development site or other location within 250 feet of the proposed project site.

(c) At sites proposed for the construction of single family or duplex residential dwellings, which are not part of a larger development, public access to the waterfront is not required as a condition of the coastal permit.

This Rule requires various forms of waterfront access to the public. The Department acknowledges the safety and security concerns relating to public access at the Crown Landing facility. Considering these issues onsite compliance with this Rule could be addressed either by providing a secured and limited area of ingress/egress to the waterfront onsite or acquiring or enhancing off-site waterfront access areas. Compliance with this Rule must be demonstrated through the submission a plan providing public access via one or more of the above recommendations.

7:7E-8.13 Buffers and Compatibility of Uses

(a) Buffers are natural or man-made areas, structures, or objects that serve to separate distinct uses or areas. Compatibility of uses is the ability for uses to exist together without aesthetic or functional conflicts.

(b) Development shall be compatible with adjacent land uses to the maximum extent practicable.

1. Development that is likely to adversely affect adjacent areas, particularly Special Areas N.J.A.C. 7:7E-3, or residential or recreation uses, is prohibited unless the impact is mitigated by an adequate buffer. The purpose, width and type of the required buffer shall vary depending upon the type and degree of impact and the type of adjacent area to be affected by the development, and shall be determined on a case-by-case basis.

2. The standards for wetland buffers are found at N.J.A.C. 7:7E-3.28.

3. The following apply to buffer treatment:

i. All buffer areas shall be planted with appropriate vegetative species, either through primary planting or supplemental planting. This landscaping shall include use of mixed, native vegetative species, with sufficient size and density to create a solid visual screen within five years from the date of planting.

ii. Buffer areas which are forested may require supplemental vegetative plantings to ensure that acceptable visual and physical separation is achieved.

iii. Buffer areas which are non-forested will require dense vegetative plantings with mixed evergreen and deciduous trees and shrubs. Evergreens must be at least eight feet tall at time of planting; deciduous trees must be at least three inches caliper, balled and burlapped; shrubs must be at least three to four feet in height.

Due to the special safety, and security issues and operations of LNG facilities the subject site may need substantial buffer areas surrounding it to assure safety and compatibility with surrounding land uses. According to the Energy Use Rule at N.J.A.C. 7:7E-7.5(S)(3)(iii), LNG facilities shall be located in areas that are not only remote and low-density but also have buffer zones likely to be maintained. Thermal exclusion zone and landscape plans should be provided to demonstrate compliance with this Rule.

7:7E-8.14 Traffic

(a) Traffic is the movement of vehicles, pedestrians or ships along a route.

(b) Coastal development shall be designed, located and operated in a manner to cause the least possible disturbance to traffic systems.

1. Alternative means of transportation, that is, public and private mass transportation facilities and services, shall be considered and, where feasible, incorporated into the design and management of a proposed development, to reduce the number of individual vehicle trips generated as a result of the facility. Examples of alternative means of transportation include: van pooling, staggered working hours and installation of ancillary public transportation facilitates such as bush shelters.

(c) When the level of service of traffic systems is disturbed by approved development, the necessary design modifications or funding contribution toward an area wide traffic improvement shall be prepared and implemented in conjunction with the coastal development, the satisfaction of the New Jersey Department of Transportation and any regional agencies.

(d) Any development that causes a location on a roadway to operate in excess of capacity Level D is discouraged. A developer shall undertake mitigation or other corrective measures as may be necessary so that the traffic levels at any affected intersection remain at capacity Level D or better. A developer may, by incorporating design modification or by contributing to the cost of traffic improvements, be able to address traffic problems resulting from the development, in which case development would be conditionally acceptable. Determinations of traffic levels which will be generated will be made by the New Jersey Department of Transportation.

(e) Coastal development located in municipalities which border the Atlantic Ocean, except as excluded under (e) 1, 2 or 3 below, shall provide sufficient on-site and/or offsite parking for its own use at a ration of two spaces per residential unit. In general, on street parking spaces along public roads cannot be credited as part of off-site parking provided for a project. All off-site parking facilities must be located either in areas within reasonable walking distance to the development or areas identified by any local regional transportation plans as suitable locations. All off-site parking facilities must also comply with N.J.A.C 7:7E-7.5(d), the parking facility rule, where applicable.

1. The non-oceanfront portions of the following municipalities which border the Atlantic Ocean are excluded from the parking requirement at (e) above:

i. Neptune Township, Monmouth County: Those portions of this municipality which are west of State Highway 71;

ii. Brick, Dover and Berkeley Townships, Ocean County: Those portions of these municipalities which are not located between Barnegat Bay and the Atlantic Ocean;

iii. Upper Township, Cape May County: Those portions of this municipality which are located between Whale Creek and the Atlantic Ocean and/or Strathmere Bay and the Atlantic Ocean; and

iv. Lower Township, Cape May County: Those portions of this municipality which are not between Lower Thorofare and the Atlantic Ocean and/or Jarvis Sound and the Atlantic Ocean;

2. The department shall reduce the parking requirement for developments restricted to senior citizen housing that is, restricted to persons at least 62 years of age or those persons meeting the definition of "senior citizen tenant" pursuant to the Senior Citizens and Disabled Protected Tenancy Act, N.J.S.A 2A:18-61, upon documentation that the paring needs of the development are less than two spaces per unit; or

3. Nursing homes and assisted living facilities are excluded from the parking requirement at (e) above.

The construction, and to the lesser extent, operation of the Crown Landing LNG facility may generate a significant volume of traffic including large equipment and material transport via roadways serving the site. In addition, in the event of a site emergency, significant traffic demands may arise at the site or surrounding roadways as a function of evacuations. Compliance with this Rule is limited to the comment provided in Table 7 of the compliance statement. It is indicated in the comment that the project will not cause local roadways to operate in excess of level of service "D". No traffic analysis was submitted in support of this assertion. Please submit a traffic analysis of the subject site with respect to demonstrating compliance with this Rule.

Based on the foregoing, the subject application is deficient and not complete for final review with respect to the Application Contents requirements and the Coastal Zone Management Rules. Accordingly, please address the indicated deficiencies and supply the needed narrative, plans and supporting information. Failure to supply the required information within ninety days of the date of this letter, pursuant to N.J.A.C 7:7-4.4(B)(4), may result in the Department Initiating cancellation of this application.

If you have any questions regarding this letter please contact me at (609) 292-9342.

Sincerely,

David Q. Risilia
Project Manager
Office of Dredging & Sediment Technology

C: William Jenkins, ACOE Philadelphia District Regulatory Branch

Anita Ripotella, National Marine Fisheries Service

Daniel Ryan, NJDEP Special Assistant to the Commissioner

Don Wilkenseon, NJDEP Fish and Wildlife

Steve Mars, US Fish and Wildlife Service

Robert Kopka, FERC

Lingard Knutson, USEPA, Region II

Laurie Beppler, BP Crown Landing

Draft Environmental Impact Statement

Crown Landing LNG and Logan Lateral Projects

Crown Landing, L.L.C.
Texas Eastern Transmission, L.P.
Docket Nos. CP04-411-000 and CP04-416-000
FERC/EIS – 0179D

Federal Energy Regulatory Commission
Office of Energy Projects
Washington, DC 20426

Cooperating Agencies

US Army Corps of Engineers

February 2005

TABLE 3.3.3-1

Environmental Comparison of the LNG Terminal Site Alternatives to the Crown Landing LNG Terminal Site

	Proposed Site	Church Landing Site	Carneys Point Site	Ferro Site	Shuran Site	Repaupo Site	Paulsboro Site	Mantua Creek Site
	Delaware River Mile 78 Logan Township, NJ	Delaware River Mile 68 Pennsville Township, NJ	Delaware River Mile 69 Pennsville and Carneys Point Township, NJ	Delaware River Mile 79 Logan Township, NJ	Delaware River Mile 80 Logan Township, NJ	Delaware River Mile 86 Greenwich Township, NJ	Delaware River Mile 88 Paulsboro Borough, NJ	Delaware River Mile 90 West Deptford, NJ
Required Criteria a/								
Site Encompasses the Thermal Exclusion/Vapor Dispersion Zone	Yes	Yes	No	No	No	No	No	Yes
Site Meets Airport Setback Requirements b/	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Site Satisfies Waterfront Handling Requirements	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Favorable Criteria								
Estimated Population Within 1 mile/2 mile Radius	82/383	1,577/5,362	482/4,407	60/178	57/589	1,943/3,783	3,578/10,354	389/8,091
Site Size (acres)	175	170	30	80	210	86	90	277
Dredging Requirement (cubic yards)	0.8 million	0.6 million	0.2 million	1.5 million	2.0 million	0.75 million	0.1 million	1.5 million
Parcel Availability c/	High	Medium (not available until 2007)	Low	Low	Medium	Medium	Medium	Unknown
Existing Site Activities	Limited Agricultural Use	Connectiv's Deepwater Generating Station	DuPont Plant	Chemical Factory	DuPont Plant	Adjacent to DuPont Plant	BP/Mobil Corporate Industrial Park	PG&E Facility
Existing Land Use	Agricultural	Industrial	Industrial	Industrial	Forested Wetland/Open	Forested/Wetland	Industrial	Open
Existing Zoning	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial	Industrial

TABLE 3.3.3-1 (cont'd)

Environmental Comparison of the LNG Terminal Site Alternatives to the Crown Landing LNG Terminal Site

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Approximate Total Sendout Pipeline Length (miles) g/	11	22	20	9	8	10	12	14
Road Access	U.S. Route 130	State Route 49	U.S. Route 130	U.S. Route 130	U.S. Route 130	Township Road	Borough Road	Township Road
Ship Channel Width and Maneuvering Area	adequate	adequate	adequate	adequate	adequate	adequate	adequate	adequate
Ship Channel Transit Distance (nautical miles) g/	61.5	52.5	53.5	63.0	64.0	68.5	70.5	71.5
Berth Orientation	perpendicular	perpendicular	perpendicular	perpendicular	perpendicular	parallel	parallel	parallel
Distance of Shore from Ship Channel (feet)	4,000	2,500	1,700	4,200	4,500	900	200	2,800
Potential Shipping Conflicts	none	yes	yes	none	none	yes	Yes	yes
Potential Bridge Conflicts	none	yes	yes	none	none	none	None	none
Per Capita Income	$22,708	$22,717	$22,717	$22,708	$22,708	$24,791	$16,368	$24,219
Percent Minority	13	3.5	3.5	13	13	5.5	36.4	7.7
Percent of Population Below Poverty Level (all ages) i/	6.2	4.9	4.9	6.2	6.2	3.6	17.7	5.3
Conflict with DE CZA and CZMP	Yes	Yes	Yes	No	No	No	No	No
Special Interest Areas	None	None	None	None	None	None	None	None
Non-tidal Wetland Impacts (acres)	<1.0	<1.0	<1.0	>10.0	>1.0	>1.0	<1/0	<1.0

TABLE 3.3.3-1 (cont'd)

Environmental Comparison of the LNG Terminal Site Alternatives to the Crown Landing LNG Terminal Site

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Other Miscellaneous Environmental Factors	--	Site is adjacent to recreation areas and historical site.	--	Site is within bald eagle nest buffer. Site development would require large amount of wetland impacts.	Site is within bald eagle nest buffer.	Site development would require large amount of wetland impacts.	Site is within bald eagle nest buffer.	Site is within bald eagle nest buffer.

a/ — Required criteria include regulatory specifications regarding LNG facility layout and safety siting.

b/ See text below for potential site conflicts in reference to the 2020 Philadelphia International Airport (PHL) Master Plan.

c/ High availability - the site is available for industrial use and a negotiated settlement to use the property has been reached with the current landowner.
Medium availability - the site is available for industrial use but no negotiations have taken place with the current landowner.
Low availability - the site is not available based on discussions between Crown Landing with the current landowner.

d/ Distance listed includes minimum distance needed to tie into existing pipeline

e/ Transit distance = start of navigation channel to terminal site

f/ Based on 2000 U.S. Census Bureau poverty thresholds.

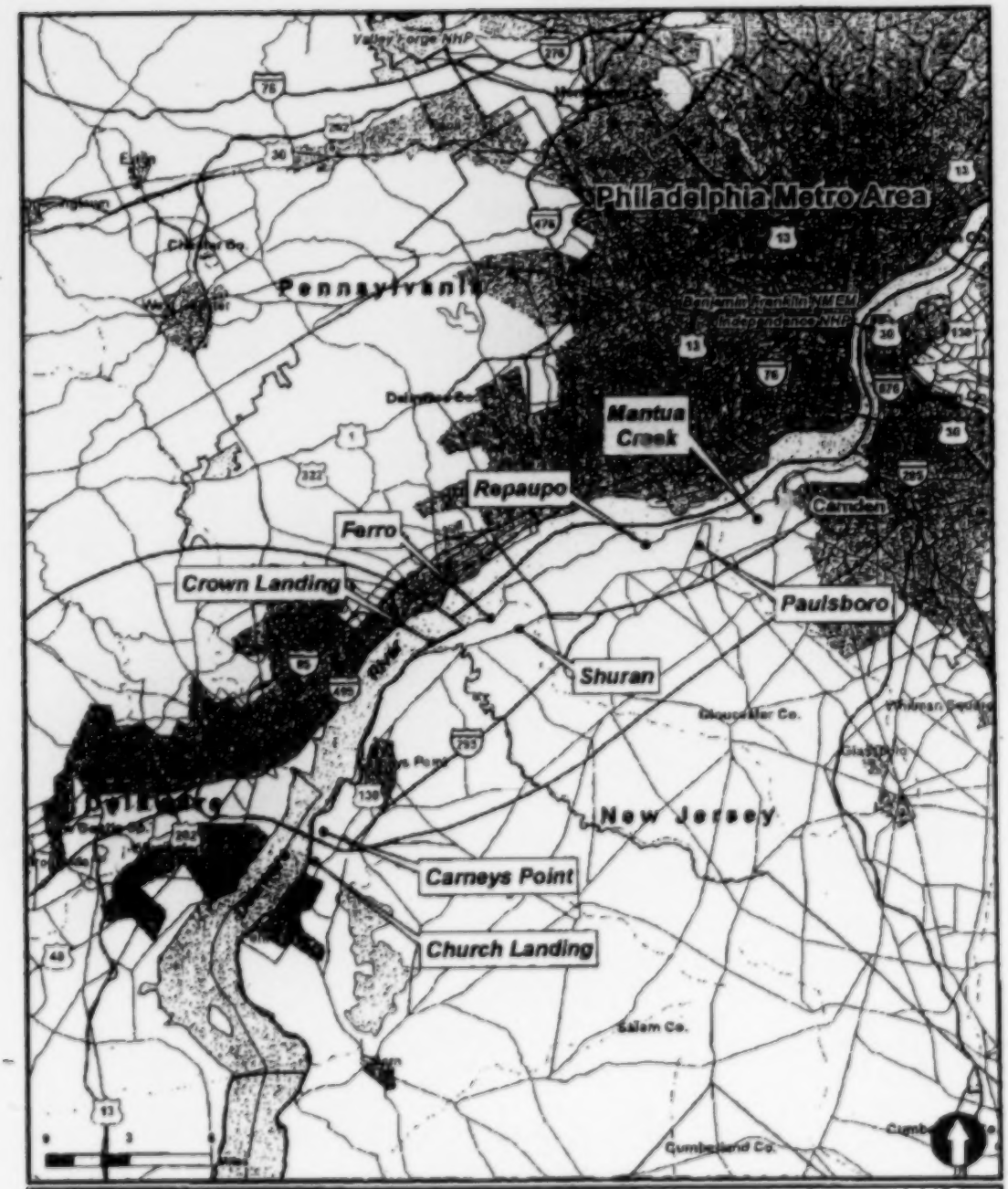

Figure 3.3.3-1
Crown Landing LNG Project
Proposed and Alternative LNG Terminal Sites Along the Delaware River

APPENDIX 10

COMPILED STATUTES
OF
NEW JERSEY

PUBLISHED UNDER THE
AUTHORITY OF THE LEGISLATURE BY VIRTUE OF
AN ACT APPROVED APRIL 12, 1910

* * * * *

VOLUME IV

* * * * *

RIPARIAN RIGHTS

Sec.

1. Board of commissioners; appointment; powers and duties.
2. Further grants, etc., not to be made until report of commissioners.
3. Commissioners; oath of office.
4. Commissioners; vacancies.
5. Surveyors, agents, etc.; appointment; entry on lands.
6. [Repealed.]
7. Notice of meetings.
8. Exterior bulkhead and pier lines established.
9. Filling in beyond bulkhead line; erection of piers.
10. Reclamation of lands under tide-waters; consent of commissioners; previous grants; repeal.
11. Conveyance or lease with covenant affecting lands under water.

12. Payment of or security for purchase-money or rent for lands under water.

13. Commissioners; appointment.

14. Commissioners; powers.

15. Grant of lands under water.

16. Commissioners; compensation.

17. Proceeds of sales and rentals; application.

18. Commissioners; oath.

19. Trespasses on lands of state under water; proceedings against trespassers; expenses.

20. Grant to person other than riparian owner; rights of riparian owner; how extinguished; appeal.

21. Riparian owners; application to commissioners for lease or conveyance.

22. Waters excluded from application of act.

23. Commissioners may change pier lines or lines for solid filling; filing map and survey.

24. Encroachment prohibited.

25. Commissioners may make lease or sale; public basins.

26. Commissioners may fix purchase-money or rentals for lands below tide-water; conveyances.

27. Compensation by canal company for lands under water taken from parties to whom the state has leased or granted them.

28. Extension of surveys over tide-waters; expenses.

29. Location of roads on land of riparian owner along shore not to affect riparian rights.

30. Grant or lease of lands whereon are natural oyster beds, restricted.

31. Grants to municipalities of lands under water in front of public square or park; conditions.

32. Use of riparian rights facing public park for business purposes.

33. Use not to forfeit grant.

34. Riparian commissioners to establish exterior bulkhead and pier lines around Islands in tidal-waters.

35. Sale or lease of lands under water embraced within established lines.

36. Removal of deposits of sand, etc., from lands under tidal-waters without license; penalty.

37. License to dig, etc., deposits of sand under tidal-waters; moneys to be paid to state treasurer.

38. Lease or grant of lands under water to persons other than riparian owners; notice.

39. Sale or lease of lands below mean high-water mark.

40. Lands under water adjacent to or in front of Palisades; leases; terms and conditions.

41. Grants to municipalities of lands under tide water in front of public park or street; conditions.

42. Consideration of grants to municipalities; reversion.

43. Conveyances to others than municipalities prohibited.

44. List of riparian leases in arrears to be prepared; reentry; notice; report of commissioners; new lease or grant.

45. Responsibility of stat treasurer as to leases; release.

46. Laying pipes under tidal waters; consent of governor and commissioners required.

47. Payments in discharge of leases; conveyance in fee simple.

48. Leases to which resolution applies.

49. Covenants, clauses and conditions to be inserted in grants or leases of lands under water.

50. Salary of commissioners.

51. Board of riparian commissioners; members; appointment; term

52. Board to be non-partisan; vacancies.

53. Terms of members of existing board ended.

54. Commissioners; compensation.

55. Repealer.

56. Commissioners not to grant exclusive right to plant or take oysters in Delaware bay.

57. Claims of persons holding deeds from state for lands under water, conveyance of which has failed; appointment of commissioners; report; payment; reconveyance of rights to state.

58. Determination of title to riparian lands or lands under water; suit in chancery; requisites of bill, etc.

59. Statement of object of suit to be given with subpoena.

60. Costs.

61. Answer of defendant; claim to be specified.

62. Issue at law to settle validity of claim.

63. Final decree to settle rights of parties; terms of decree.

An Act to ascertain the rights of the state and of the riparian owners in the lands lying under the waters of the bay of New York, and elsewhere in the state.

(P. L. 1864, p. 681. P. L. 1869, p. 1017. P.L. 1871, p. 44. P. L. 1872, p. 99. P. L. 1874, pp. 103, 136. P. L. 1875, p. 53. P. L. 1877, p. 113. Rev. 1877, p. 980.)

Preamble.—Whereas, it is represented to the legislature of the state that grants of rights to occupy land under the waters of the bay of New York and the Hudson river, and elsewhere within the state have been made and are liable to be made, without sufficient information of the rights of the state and of the riparian owners in the same, therefore, with the view of obtaining the proper information to enable the legislature to protect the rights of the state,

1. **Board of commissioners; appointment; powers and duties.**—That a board of commissioners be nominated by the governor and confirmed by the senate, to consist of six citizens of this state, who shall have power and whose duty it shall be to cause the necessary surveys and examinations to be made by competent surveyors of the lands lying under the waters of the bay of New York and of the Hudson river, and of the lands adjacent thereto, the Kill von Kull, Newark bay, Arthur's kill, the Raritan bay, and the lands lying under the water of the Delaware river, opposite to the county of Philadelphia, the right to reclaim which has not been granted by the state, and to obtain all needful information from other sources, in order to ascertain the present rights of the state in the same, and the value of said rights; and to fix and establish an exterior line in the said bays and rivers, beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind shall be permitted to be made, and to report to the next legislature, on or before the first day of February next, the result of the information thus obtained, and the value of the said rights, together with the evidence upon which the same is founded; and second, that they shall recommend to the legislature such plans and provisions for the improvement, use, renting or leasing of the said lands under water as they shall deem necessary for and most conducive to the interest of the state, and to have prepared, and submit with their report, maps of said land exhibiting the exterior line fixed and established by them in said bays and rivers, and the

lines of the existing piers, wharves and bulkheads, and also showing any grants of lands under the waters of said bays and rivers which have not been occupied and also the original shore line as far as the same can be ascertained, accompanied with such field notes, measurements and elucidations as they shall deem necessary to a full exposition and understanding on the subject. (Rev. 1877, p. 981.)

2. **Further grants, etc., not to be made until report of commissioners.**--That until such report is made no further grant, lease or sale of any of said lands shall be made, and the said commissioners may apply to the chancellor for an order to restrain and stay all proceedings, erections and obstructions until the further direction of the legislature; and if any permanent erection in or obstruction of the said waters, within the said exterior line to be fixed or established by them, be commenced or continued after such order, the said chancellor may cause the said order to be enforced, and disobedience thereof to be punished by the court of chancery, in the same manner and to the same extent as in cases of injunction issued out of said court; and any permanent erection or obstruction, made contrary to any such written order, may be removed and abated by the order of the chancellor; provided, however, that the said commissioners or the chancellor shall not interfere with any rights already granted, or which have been or may be granted at the present session of the legislature. (Rev. 1877, p. 981.)

3. **Commissioners; oath of office.**--That the said commissioners shall take and file in the office of the secretary of state an oath well, truly and faithfully to perform the duties of their appointment, before entering upon said duties, and they shall not be or become interested, directly or indirectly, in any water rights or rights to occupy lands under water in the said bays or rivers, nor in any real estate that can in any way be benefited or affected by the establishment of such exterior lines, or by any measures that they may recommend; and upon proof being made to the governor of any one of said commissioners

being so interested, and upon a hearing of a party so charged, he may be removed from office by the governor. (Rev. 1877, p. 981.)

4. **Commissioners; vacancies.**—That any vacancies in the board of commissioners, caused by removal, resignation, refusal to serve or otherwise, shall be filled by appointment by the governor, of a citizen of this state not interested as aforesaid. (Rev. 1877, p. 981.)

5. **Surveyors, agents, etc.; appointment; entry on lands.**—That the said commissioners may appoint surveyors, agents and others necessary for the discharge of these duties, and they and their agents may enter upon any land for the purpose of surveying or obtaining any information on the subject of their appointment. (Rev. 1877, p. 981.)

6. [Repealed.]

7. **Notice of meetings.**—That the said commissioners shall give public notice of the time and place of their first meeting by advertisement published for ten days in each of the papers printed in the counties in which the commissioners shall make their investigation, and all subsequent meetings of the commissioners shall be publicly adjourned to some particular time and place. (Rev. 1877, p. 982.)

8. **Exterior bulkhead and pier lines established.**—Sec. 1. That the bulkhead line or lines of solid filling and the pier lines in the tide-waters of the Hudson river, New York bay and Kill von Kull, lying between Enyard's dock, on the Kill von Kull and the New York state line, so far as they have been recommended and reported to the legislature by the commissioners appointed under the original act, of which this is a supplement, by report bearing date February first, eighteen hundred and sixty-five, are hereby adopted and declared to be fixed and established, as the exterior bulkhead and pier lines between the points above named, as such exterior bulkhead and

pier lines, so fixed, established and adopted, are shown upon the manuscript maps, accompanying said report, and filed in the office of the secretary of state, except said lines drawn on said maps over or upon lands within the boundaries of the grant made to the Morris canal and banking company, by act approved March fourteenth, eighteen hundred and sixty-seven. (Rev. 1877, p. 982)

9. **Filling in beyond bulkhead lines; erection of piers.**—*Sec. 2.* That it shall not be lawful to fill in with earth, stones or other solid material, in the tide-waters of the Hudson river, New York bay and Kill von Kull, beyond the bulkhead line or lines of solid filling by this act adopted, fixed and established, laid down and exhibited on the aforesaid maps; and that it shall not be lawful to erect or maintain any pier or other structure exterior to the said bulkhead line or lines of solid filling in any place or places where no exterior line for piers is reported or indicated by said maps, on the Hudson river, New York bay and Kill von Kull; and that when an exterior line for piers is recommended and shown by said report and maps, no erection or structure of any kind shall hereafter be erected, allowed or maintained beyond or exterior to the aforesaid bulkhead line or lines of solid filling, except piers which shall not exceed one hundred feet in width respectively, and which shall in no case extend beyond the line indicated for piers on said maps accompanying said report; and no piers shall hereafter be constructed in said tide-waters, when such exterior pier lines are adopted, fixed and established, at less intervals between such piers than seventy-five feet, except at places occupied and used for ferries, or to be so occupied or used, when the spaces between the piers may be less; nor shall any such pier be constructed in any other manner than on piles or on blocks and bridges; and if on blocks and bridges, such blocks and bridges shall not occupy more than one-half of the length of the pier, and they shall be so constructed as to permit a free flow or passage of water under and through them, without any other interruption or obstruc-

tion than the pile or blocks necessary to support said piers. (Rev. 1877, p. 982.)

10. Reclamation of lands under tide-waters; consent of commissioners; previous grants; repeal.—Sec. 3. That the act entitled "An act to authorize the owners of lands upon tide-waters to build wharves in front of the same," approved March eighteenth, one thousand eight hundred and fifty-one, be and the same is hereby repealed as to the tide-waters of this state below the line of mean high tide; but said repeal shall not be construed to restore any supposed rights, usage or local common law, founded upon the tacit consent of the state or otherwise to fill in any land under water below mean high tide; and without the grant or permission of said commissioners no person or corporation shall fill in, build upon or make any erection on or reclaim any of the lands under the tide-waters of this state; and in case any person or corporation so offending shall be guilty of purpresture, which shall be abated at the cost and expense of such person or corporation, on application of the attorney-general, under decree of the court of chancery or by indictment in the county in which the same may be, or opposite to or adjoining which said purpresture may be; provided, however, that neither this section nor any provision in this act contained shall in any wise repeal or impair any grant of land under water, or right to reclaim made directly by legislative act, or grant or license, power or authority, so made or given, to purchase, fill up, occupy, possess and enjoy lands covered with water fronting and adjoining lands owned or authorized to be owned by the corporation, or grantee or licensee in the legislative act mentioned, its, his or their representatives, grantee or assigns, or to repeal or impair any grant or license, power or authority to erect or build docks, wharves and piers opposite and adjoining lands owned, or authorized to be owned by the corporation, or grantee or licensee in the legislative act mentioned, its, his or their representatives, grantees or assigns heretofore made, or which may be made or

granted at the time this act goes into effect, or given directly by legislative acts, whether said acts are or are not repealable, and as to any revocable license given by the board of chosen freeholders of a county before this act goes into effect to build docks, wharves or piers, or to fill in or reclaim any lands under water in this state, the same shall be irrevocable so far as the land under water has been or shall be lawfully reclaimed or built upon under any such license issued prior to July first, eighteen hundred and ninety-one, provided such reclamation or building under such license shall be completed prior to January first, eighteen hundred and ninety-two; but as to the future such revocable license, if the said lands covered by the license have not been wholly or in part lawfully reclaimed or built upon, is hereby revoked, and no occupation or reclamation of land under water without such legislative act or revocable license shall divest the title of the state, or confer any rights upon the party who has reclaimed or who is in possession of the same. (Rev. 1877, p. 982, as amended P. L. 1891, p. 216.)

[Inconsistent laws repealed.]

11. Conveyance or lease with covenant affecting lands under water.—Sec. 4. That in case any person or corporation who by any legislative act, is a grantee or licensee, or has such power or authority, or any of his, her or their representatives or assigns shall desire a paper capable of being acknowledged and recorded, made by and in the name of the state of New Jersey, conveying the land in the proviso to the third section mentioned whether under water now or not, and the benefit of an express covenant, that the state will not make or give any grant or license power, or authority affecting lands under water in front of said lands, then and in either of such cases, such person or corporation, grantee or licensee, having such grant and license, power or authority, his, her or their representatives or assigns on producing a duly-certified copy of such legislative act to said commissioners, and m case of a representative or assignee also satisfactory evi-

dence of his, her or their being such representative or assignee, and requesting such grant and benefits as in this section mentioned, shall be entitled to said paper so capable of being acknowledged and recorded, and granting the title and benefits aforesaid, on payment of the consideration hereinafter mentioned; and the said commissioners or any two of them, with the governor and attorney-general for the time being, to be shown by the governor signing the grant, and the attorney-general attesting it, shall and may execute and deliver and acknowledge in the name and on behalf of the state, a lease in perpetuity to such grantee or licensee or corporation having such grant, license, power or authority, and to the heirs and assigns of such grantee or licensee, or to the successors and assigns of such corporation, upon his, her or their securing to be paid to the state an annual rental of three dollars for each and every lineal foot measuring on the bulkhead line, or a conveyance to such grantee or licensee or corporation having such grant, license, power or authority, and to the heirs and assigns of such grantee or licensee, or to the successors and assigns of such corporation in fee, upon his, her or their paying to the state fifty dollars for each and every lineal foot measuring on the bulkhead line, in front of the land included in said conveyance; provided, that no corporation to whom any such grant, license, power or authority was given by legislative act as aforesaid, in which provision was made for the payment of money to the treasurer of the state for each and every foot of the shore embraced and contained in the act; nor the assigns of such corporation shall be entitled to the benefits of this section; and provided further, that the said commissioners shall in no case grant lands under water beyond the exterior lines hereby established, or that may be hereafter established, but the said conveyance shall be construed to extend to any bulkhead or pier line further out on said river and bay that may hereafter be established by legislative authority; in case any person or corporation taking a lease under this section, shall desire af-

terwards a conveyance of all or any part of the land so leased, the same shall be made upon payment of the said sum of fifty dollars for every such lineal foot, as aforesaid, of the land so desired to be conveyed, the conveyance or lease of the commissioners under this or any other section of this act, shall not merely pass the title to the land therein described, but the right of the grantee or licensee, individual or corporation, his, her or their heirs and assigns, to exclude to the exterior bulkhead line, the tide-water by filling in or otherwise improving the same, and to appropriate the land to exclusive private uses, and so far as the upland from time to time made shall adjoin the navigable water, the said conveyance or lease shall vest in the grantee or licensee, individual or corporation, and their heirs and assigns, the rights to the perquisites of wharfage, and other like profits, tolls and charges. (Rev. 1877, p. 983.)

12. Payment of or security for purchase-money or rent for lands under water.— Sec. 5. That no grant hereafter made, extending beyond the line of high-water mark, shall be in force or operation as to so much thereof as extends below said line of high-water mark, until the grantee or grantees shall have paid into the treasury of the state such compensation or rentals, or secured to the state such payment or rentals for the estate in the lands lying below the said line of mean high-water mark, contained in and conveyed by such grant or lease as is hereinafter provided. (Rev. 1877, p. 984.)

13. Commissioners; appointment.—Sec. 6. That four commissioners shall be appointed by the governor, by and with the advice and consent of the senate, who are hereby required and empowered to complete as much of the details of the work assigned to them by such original act, by surveys and otherwise, on the Hudson river, New York bay, and Kill von Kull, as in their judgment the interest of the state requires. (Rev. 1877, p. 984.)

14. Commissioners; powers.—Sec. 7. That all the powers and duties of the said commissioners, contained in the act to which this is a supplement, be and the same are hereby continued in force, except so far as the same are superseded or modified by any of the provisions of this act. (Rev. 1877, p. 984.)

15. Grant of lands under water.—Sec. 8. That if any person or persons, corporation or corporations, or associations, shall desire to obtain a grant for lands under water which have not been improved, and are not authorized to be improved, under any grant or license protected by the provisions of this act, it shall be lawful for any two of the said commissioners concurring, together with the governor and attorney-general of the state, upon application to them, to designate what lands under water for which a grant is desired lie within the exterior lines, and to fix such price, reasonable compensation, or annual rentals for so much of said lands as lie below high-water mark, as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries, and the price, compensation or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the secretary of state; and upon the payment of such price or compensation or annual rentals, or securing the same to be paid to the treasurer of this state, by such applicant, it shall be lawful for such applicant to apply to the commissioners for a conveyance, assuring to the grantee, his or her heirs and assigns, if to an individual, or to its successors and assigns, if to a corporation, the land under water so described in said certificate; and the said commissioners shall, in the name of the state, and under the great seal of the state, grant the said lands in manner last aforesaid, and said conveyance shall be subscribed by the governor and attested by the attorney-general and secretary of state, and shall be prepared under the direction of the attorney-general, to whom the grantee shall pay the expense of such preparation, and upon the delivery of such conveyance, the grantee may

reclaim, improve, and appropriate to his and their own use, the lands contained and described in the said certificate; subject, however, to the regulations and provisions of the first and second sections of this act, and such lands shall thereupon vest in said applicant; provided, that no grant or license shall be granted to any other than a riparian, proprietor, until six calendar months after the riparian proprietors shall have been personally notified in writing by the applicant for such grant or license, and shall have neglected to apply for the grant or license, and neglected to pay, or secured to be paid, the price that said commission shall have fixed; the notice in the case of a minor shall be given to the guardian, and in case of a corporation to any officer doing the duties incumbent upon president, secretary, treasurer or director, and in case of a nonresident, the notice may be by publication for four weeks successively in a daily newspaper published in Hudson county, and in a daily newspaper published in New York city. (Rev. 1877, p. 984.)

16. **Commissioners; compensation.**—Sec. 9. That the same compensation for the time and personal expenses of said commissioners shall be allowed and paid as heretofore, and all other expenditures to be incurred by the said commissioners in the prosecution and completion of their works contemplated by the original act and this supplement, shall not exceed the sum of five thousand dollars annually, which sum is hereby appropriated out of any money in the treasury not otherwise appropriated, to be subject to the draft of said commissioners, and shall be paid upon the warrant of the comptroller, upon satisfactory vouchers being produced of such expenditures made or incurred. (Rev. 1877, p. 985.)

17. **Proceeds of sales and rentals; application.**—Sec. 10. That the moneys so received from the sales and rentals of the said lands under water shall be first appropriated to the payment of such appropriation as the legislature may authorize from time to time, then to the payment and liquidation of the state debt, and afterwards the

same shall be invested according to law, and the interest thereof be annually paid over to the trustees of the school fund, to be appropriated by them towards the maintenance of free schools. (Rev. 1877, p. 985.)

18. Commissioners; oath.—Sec. 11. That the said commissioners shall take and file in the office of the secretary of state, an oath, well, truly and faithfully to perform the duties of their appointment before entering upon their said duties. (Rev. 1877, p. 985.)

19. Trespasses on lands of state under water; proceedings against trespassers; expenses.—Sec. 12. That the said commissioners may commence proceedings in the name of the state of New Jersey, by ejectment or otherwise, against persons and corporations trespassing upon or occupying the lands of the state under water, or which were heretofore under water, and the attorney-general of the state is hereby required to commence and prosecute such actions as may be instituted or directed by the said commissioners; and his expenses and disbursements, and the expenses and disbursements of such assistants as may be appointed by the governor, and their reasonable charges and counsel fees shall be taxed by the chief justice and paid by the treasurer, on presentation of the bill so taxed. (Rev. 1877, p. 985.)

20. Grant to person other than riparian owner; rights of riparian owner; how extinguished; appeal.—Sec. 13. That in any case where a grant of the lands of the state under water is made by the commissioners, to any person other than the riparian owner that the state's grantee shall not fill up or improve said lands under water until the rights and interest of the riparian owner in said lands under water (if any he has) shall be extinguished, as follows: the said commissioners shall fix the amount to be paid to said riparian owner for his rights and interest therein (if any he has), and said riparian owner shall have the right, within twenty days after he has been notified of said amount, to accept said sum in

full extinguishment of all his rights, or if he is dissatisfied with said award he may apply to the supreme court at the next term thereafter for a struck jury to try the question in such place as may be designated by said court, and said jury may increase or diminish the amount to be paid the said riparian owner, and their verdict shall be final as to said amount, and on the payment or tender by the state's grantee to the riparian owner of the amount fixed by said jury all the rights and interests of said riparian owner in the lands of the state under water in front of his land shall be extinguished; that the costs of the trial shall be paid as follows: if the verdict of the jury is greater than the award of the commissioners then the state shall pay the costs of the trial, if the verdict is the same as the award or less than the award of the commissioners then the riparian owner shall pay the costs. (Rev. 1877, p. 985.)

21. Riparian owners; application to commissioners for lease or conveyance.—Sec. 1. That any riparian owner on tide-waters in this state who is desirous to obtain a lease, grant or conveyance from the state of New Jersey of any lands under water in front of his lands, may apply to the commissioners appointed under the act to which this is a supplement and the supplements thereto, who may make such lease, grant or conveyance with due regard to the interests of navigation, upon such compensation therefor, to be paid to the state of New Jersey, as shall be determined by said commissioners, which lease, conveyance or grant shall be executed as directed in the act to which this is a supplement and the supplements thereto, and shall vest all the rights of the state in said lands in said lessee or grantee. (Rev. 1877, p. 985.)

22. Waters excluded from application of act.—Sec. 2. That this act shall not interfere with the original act or its supplements as to the waters of the Hudson river, New York bay or Kill von Kull, easterly of Enyard's dock. (Rev. 1877, p. 985.)

Preamble. —Whereas, the riparian commissioners recommend some changes in the line for solid filling in the bay of New York and Hudson river, and to enable them to make the changes proposed, and to Provide additional wet basins in the same;

23. Commissioners may change pier lines or lines for solid filling; filing map and survey.—Sec. 1. That the riparian commissioners may change, fix and establish any other lines than those now fixed and established for pier lines, or lines for solid filling in the waters of the bay of New York or the Hudson river, or make any changes in any basin now fixed and established, or lay out and fix and establish any new basin or basins in the waters of the bay of New York or the Hudson river, and when so fixed and established, the said riparian commissioners shall file a map and surveys in the office of the secretary of state, showing what lines have been fixed and established by them for the exterior lines for solid filling and pier lines, as well as for any changes in basins or new basins fixed, laid out and established by them under this act. (Rev. 1877, p. 986.)

24. Encroachment prohibited.—Sec. 2. That from and after the filing of said map and surveys in the office of the secretary of state, no encroachment of any kind shall be permitted to be made beyond said lines so fixed and established for solid filling or pier lines, or in or upon any basin or basins so laid out and established. (Rev. 1877, p. 986.)

25. Commissioners may make lease or sale; public basins.—Sec. 3. That the said riparian commissioners may make, for a satisfactory consideration, any lease or sale to the owners of the lands fronting on the said basin, of the right to have the exclusive use of the said basin or basins, for the purpose of wharfage and docking, and to charge a reasonable sum for the use of the same on the line of bulkhead owned by them respectively; and that from and after the filing of said map and survey, the same

shall remain as a public basin or basins, and they are hereby dedicated for that purpose. (Rev. 1877, p. 986.)

26. **Commissioners may fix purchase-money or rentals for lands below tide-water; conveyances.**—Sec. 1. That from and after the passage of this act it shall be lawful for the riparian commissioners, or any three of them therein concurring, together with the governor of this state, to fix and determine, within the limits prescribed by law, the price or purchase-money, or annual rental to be paid by any applicant for so much of lands below high-water mark, or lands formerly under tide-water belonging to this state as may be described in any application therefor duly made according to law; and the said commissioners, or any three of them therein acting and concurring, with the approval of the governor, shall in the name and under the great seal of the state, grant or lease said lands to such applicant accordingly; and all such conveyances or leases shall be prepared by the said commissioners or their agents at the cost and expense of the grantee or lessee therein, and shall be subscribed by the governor, and at least three of said commissioners, and attested by the secretary of state. (Rev. 1877, p 986.)

[Inconsistent laws repealed.]

27. **Compensation by canal company for lands under water taken from parties to whom the state has leased or granted them.**—Sec. 1. That in all cases where lands which now are or ever have been under the tide-waters of this state, but which have been or may hereafter be leased or granted by this state to any person or persons, party or parties, shall be taken by the company incorporated by an act entitled "An act to incorporate a company to form an artificial navigation between the waters of Newark bay and New York bay," approved March thirteenth, one thousand eight hundred and sixty-six, or by virtue of any supplement thereto, or by any commissioners appointed under last-mentioned act; that in such case such person or persons, party or parties, and

all persons claiming through and under them, or either of them, shall be entitled to compensation for the lands or any materials so taken, in the same way and manner as the owner or owners of lands and materials taken for said company, under and by virtue of last-mentioned act, or the supplements thereto, are entitled to compensation therefor; and in case of dissatisfaction with the report made by the commissioners appointed under last-mentioned act, and the supplements thereto, they or either of them shall have the same right to appeal, and under the same provisos as is provided for by the said last-mentioned act, and the supplement thereto; provided, however, that nothing in this act or in the said act approved March thirteenth, one thousand eight hundred and sixty-six, or any supplement thereto shall be construed to give any right, title or interest of the state to lands under water to any person or persons, corporation or corporations. (Rev. 1877, p. 987.)

[Inconsistent laws repealed.]

Preamble.—Whereas, applications are frequently made to the riparian commissioners for grants of lands under tide-water in various parts of the state, requiring surveys to be made and maps to be prepared and filed with the secretary of state, and some provision should be made to have these surveys extended from time to time as the citizens of the state may require, and in order to provide the necessary means for carrying on this work without any additional tax on the treasury of the state; therefore,

28. Extension of surveys over tide-waters; expenses.— Sec. 1. That the riparian commissioners may and shall, at the request of shore-owners, extend their surveys over the tide-waters of this state and prepare maps and have the same filed as now provided by the act to which this is a supplement and the supplements thereto; and to provide the necessary means to pay the expenses incurred by them in this work they may retain

and expend for this purpose from the riparian fund, before any portion thereof is transferred to the school fund for permanent investment, a sum not exceeding in the aggregate five per centum of the amount named in the grants made to riparian owners, and they may further retain and disburse from the said fund the necessary sum to pay the salaries of the commissioners and the expenses incurred in the prosecution of their work as now provided by law, rendering in their annual report a detailed statement of the amounts so retained and disbursed; provided, that when in any year the grants made by the commissioners shall not amount (after deducting the above specified five per cent.) sufficient sum to pay the said salaries and expenses, such salaries and expenses shall be paid from the state treasury, and be returned thereto by the said commissioners from the proceeds of the first subsequent grants thereafter made. (Rev. 1877, p. 987, as amended P. L. 1888, p. 437.)

29. Location of roads on land of riparian owner along shore not to affect riparian rights.—Sec. 1. That when land has been or shall be taken or granted for a right of way, and such right of way has been or shall be so located on land of a riparian owner as to occupy the same along or on the shore line, and thereby separate the upland of such riparian owner adjoining that used for such right of way from tide-water, such owner of the land so subject to such right of way shall be held to be the riparian owner for the purpose of receiving any grant or lease heretofore or hereafter made of lands of the state under water, or for the purpose of receiving any notice under the act to which this is a supplement or the supplements thereto: provided, that nothing in this act shall affect the rights of the state to the lands lying under water. (Rev. 1877, p. 987.)

30. Grant or lease of lands whereon are natural oyster beds, restricted.—Sec. 1. That no grant or lease of lands under tide-water, whereon there are natural oyster beds, shall hereafter be made by the riparian commis-

sioners of this state, except for the purpose of building wharves, bulkheads or piers. (P. L. 1888, p. 140.)

31. Grants to municipalities of lands under water in front of public square or park; conditions.—Sec. 1. That whenever any public square or park now dedicated in any city or other municipality shall front upon any tide-waters in this state, the city or other municipality may apply through its legislative body to the commissioners appointed under the acts to which this is a further supplement for a grant or conveyance to such city or municipality of the lands under water in front of such public square or park; such grant to contain provisions that the same shall be kept and maintained as an open public square forever fronting on such tide-water; and that no buildings or other structures shall be erected on such square or park, or on the lands under water, which shall in any way obstruct or interrupt the view or public access to the water from any part of the said square or park; that said commissioners shall make said grant or conveyance, at a consideration of one dollar, upon receiving a written assent to such grant or conveyance of the person or corporation owning the title to the fee of the soil embraced within such public square or park; that such grant or conveyance shall contain the above provisions, and a copy of such assent, and shall also contain a provision that if at any time after the grant aforesaid such public square or park shall cease to be used as such, the lands under water granted as aforesaid shall at once revert to this state. (P. L. 1889, p. 322.)

[Inconsistent laws repealed.]

32. Use of riparian rights facing public park for business purposes.—Sec. 1. Any city or other municipality which shall have received, or may hereafter receive, from the riparian commissioners of the state of New Jersey, a grant of lands under water in front of any public square or park in such city or other municipality, under and by virtue of an act of the legislature of New Jersey

entitled "A further supplement to 'An act to ascertain the rights of the state and of riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this state,' approved April eleventh, one thousand eight hundred and sixty-four, and the several supplements thereto," and which said supplement was approved April nineteenth, eighteen hundred and eighty-nine, may, when in the judgment of the governing body of said city or other municipality it shall seem wise and for the best interests of said city or other municipality so to do, enter into a contract with the person or corporation owning the title to the fee of the soil embraced within such public square or park, or with any person or corporation to whom said owner of the fee of the soil thereof may have granted their rights in the said lands under water in front of said public square or park, upon such terms as may be agreed upon, whereby said lands under water in front of said square or park, or any part thereof, may be used by said owner of the fee, or person or corporation acquiring said rights of the owner of the fee for the purpose of docking, berthing, loading and unloading vessels, upon or over the said lands under water, from a dock adjacent to said lands under water for such period of time as in the judgment of such governing body may seem best for the interests of said city or other municipality; provided, that such contract shall contain a provision that no buildings or other structures shall be erected on the said lands under water in front of said public square or park which shall in any way obstruct or interrupt the view or public access to the water from any part of said square or park; and provided further, that a grant of said lands shall have first been made by the riparian commissioners of the state of New Jersey, with the privilege of using such waters for the purposes aforesaid. (P. L. 1901, p. 54.)

33. Use not to forfeit grant.—Sec. 2. The entering into and making of any such contract, and the use of said lands under water in accordance therewith, shall not be nor be construed to be a forfeiture of the grant of said

lands under water or any part thereof by said city or other municipality under said act. (P. L. 1901, p. 55.)

Preamble.—Whereas, there are islands situate in the tidal waters of this state, the lands below mean high water adjoining to which are the property of this state and are capable of being used for the erection and construction thereon of docks, wharves, piers, warehouses and other structures, which use will greatly promote foreign and inland commerce; and whereas, there are reefs and shoals in the tidal-waters of this state awash or submerged at mean high water which are the property of this state, which reefs and shoals and the lands below mean high water adjoining thereto which are also the property of this state, are also capable of such use as aforesaid, and foreign and inland commerce will be greatly promoted thereby; and whereas, it is just and wise that the state should so legislate as to permit its said lands to be used as aforesaid;

34. Riparian commissioners to establish exterior bulkhead and pier lines around islands in tidal-waters.—Sec. 1. That the riparian commissioners, or a majority of them, therein concurring, with the approval of the governor and after consultation with the board of engineers, acting under the authority of the secretary of war, and known as the harbor commission, shall, from time to time, fix and establish around or in front of all islands, reefs and shoals situate in the tidal-waters of this state, exterior lines in said waters, beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind shall be made or maintained, and also interior lines for solid filling in said waters, beyond which no permanent obstruction shall be made or maintained other than wharves and piers and erections thereon for commercial uses; provided, however, that no exterior line around or in front of any such island, reef or shoal shall be fixed and established in front of any riparian grant which has been heretofore made, unless such exterior line shall be fixed and established after consultation with the

said board of engineers at such distance as will, in the judgment of said commissioners, leave a sufficient waterway in front of said grants for navigation, and when the riparian commissioners shall have so fixed and established said lines after consultations aforesaid, they shall file a survey and map thereof in the office of the secretary of state, showing the lines for piers and lines for solid filling so fixed and established. (P. L. 1891, p. 15.)

35. Sale or lease of lands under water embraced within established lines.—*Sec. 2. That* the said riparian commissioners, or a majority of them, together with the governor, may sell or let to any applicant therefor any of the lands under water and below mean high-water mark, embraced within the lines so fixed and established, upon such terms as to purchase money or rental, and under such conditions and restrictions as to time and manner of payment, the duration and renewal of any lease, the occupation and use of the land sold or leased, and such other conditions and restrictions as the interest of the state may require, and as may be fixed and determined by the said riparian commissioners, or a majority of them, together with the governor. (P. L. 1891, p. 16.)

[Inconsistent laws repealed.]

36. Removal of deposits of sand, etc., from lands under tidal-waters without license; penalty.—Sec. 1. That no person or corporation shall dig, dredge or remove any deposits of sand or other material from the lands of the state lying under tidal-waters without a license so to do first obtained as provided in the second section of this act, and any person or corporation who shall so unlawfully dig, dredge or remove any deposit of sand or other material as aforesaid shall forfeit and pay for each and every such offense the sum of one hundred dollars, to be prosecuted for and recovered by an action on contract by any person or persons in any court of competent jurisdiction with costs of suit, the one-half the amount so recovered to be for the use of the state, and the other half to the use of

the person or persons who shall sue for and prosecute the same to effect; provided, however, that nothing in this section contained shall prevent the owner of any grant or lease from the state, or the assignee or lessee thereof, from digging, dredging, removing, and taking sand and other material within the lines of, or in front of, such grant or lease, for the purpose of improving lands granted or leased to them, or their grantors or lessors, by the state, nor prevent such owner, assignee or lessee from digging or dredging a channel or channels to the main channels, and removing and taking the material therefrom. (P. L. 1891, p. 213.)

37. License to dig, etc., deposits of sand under tidal-waters; moneys to be paid to state treasurer.—Sec. 2. That the riparian commissioners or a majority of them therein concurring with the approval of the governor, may, under such terms and restrictions as to duration, compensation to be paid, and such other conditions and restrictions as the interests of the state may require, license by an instrument in writing, executed in the same manner as grants of lands under water are required to be executed, any person, persons or corporations to dig, dredge or remove any deposits of sand or other material from the lands of the state under tidal-waters; and the moneys received from any such licenses as aforesaid shall be paid to the treasurer of the state for state purposes. (P. L. 1891, p. 214.)

38. Lease or grant of lands under water to persons other than riparian owners; notice.—Sec. 3. That the riparian commissioners, with the approval of the governor, may lease or grant the lands of the state below mean high-water mark and immediately adjoining the shore, to any applicant or applicants therefor other than the riparian or shore-owner or owners, provided the riparian or shore-owner or owners shall have received six months' previous notice of the intention to take said lease or grant such notice given by the applicant or applicants therefor, and the riparian or shore-owner or owners shall

otherwise, on any part of the land lying between the base of the vertical line of the Palisades and high-water mark on the Hudson river, for the purpose of preparing the ground for the construction of buildings, or for commercial purposes; and provided further, that this act shall not apply to or in any way affect any right of the state involved in any pending suit or suits, nor shall it, nor shall any of its provisions affect or impair any lease or leases, grant or grants already made by the riparian commissioners. (P. L. 1895, p. 89, as amended P. L. 1898, p. 439.)

41. Grants to municipalities of lands under tide water in front of public park or street; conditions.—Sec. 1. Whenever any public park has been or shall hereafter be laid out or provided for by ordinance of any city or other municipality, under the authority of any act of the legislature of this state, along or fronting upon any of the tide waters of this state, and whenever any streets or highways shall extend to said tide waters, such municipality may apply through its legislative body to the commissioners appointed under the act to which this is a further supplement, for a grant or conveyance to such city or municipality of the lands under water within the limits of said public park, and of the land in front of said streets or highways; such grant to contain a provision that any land under water granted or conveyed for park uses shall be kept and maintained as an open public park or place for public resort and recreation, and that no building or other structures shall be erected on such park or on the lands under water so granted and conveyed inconsistent with its use as a public park or place for public resort and recreation; provided, however, that public walks and drives may be constructed along or upon any portion of the land so granted or conveyed. (P. L. 1903, p. 387.)

42. Consideration of grants to municipalities; reversion.—Sec. 2. The commissioners may, upon the payment therefor of a consideration, the amount of which shall be fixed in the manner now provided by law for the fixing of the amount of the considerations to be paid for

grants of riparian lands by said commissioners, make all such grants or conveyances applied for as aforesaid for the lands under water owned by the state extending from the inland limits of such park to the exterior line established or to be hereafter established by the said commissioners, and for all land under water within the lines of the streets or highways, and in front of the ends of such streets or highways and extending from the high-water lines of said exterior line; and said grant or conveyance shall also contain a provision that if at any time after the grant or conveyance aforesaid has been made, such public park or highway shall cease to be used as such park or place for public resort and recreation, or as such street or highway, the lands under water, granted as aforesaid in front thereof, shall at once revert to the state. (P. L. 1903, p. 388.)

43. Conveyances to others than municipalities prohibited.—Sec. 3. No conveyance shall hereafter be made by the said commissioners, except to the municipality aforesaid, of any land under water within the limits of such park or within the lines or at the end of any such public street or highway or oceanward thereof. (P. L. 1903, p. 388.)

[Inconsistent laws repealed.]

44. List of riparian leases in arrears to be prepared; re-entry; notice; report of commissioners; new lease or grant.—Sec. 1. It shall be the duty of the state treasurer on or before the first Tuesday in January, in each year, to make out a list of all riparian leases held by the state on which rentals are in arrears and unpaid for the space of one year, and to transmit the same to the board of riparian commissioners, and in case any lease, the rentals of which are in arrears and unpaid, as aforesaid, shall contain a covenant or condition that upon nonpayment or failure to pay the yearly rent or sum reserved in said lease at the time or times fixed for the payment thereof it should be lawful for the state of New Jersey by

its officers or agents, to re-enter, and to have, possess and enjoy, after such re-entry, the lands described in said lease, then the riparian commissioners, or any one of them, are hereby authorized and empowered to enter upon the land described in said lease, and in the name and behalf of the state of New Jersey, to take possession thereof. Such entry shall be made by said riparian commissioners, or by one of them, by going on said land, and announcing in the presence of one or more witnesses, that all rights under said lease are forfeited to the state of New Jersey. Before such entry is made, however, the board of riparian commissioners shall give notice, by publication at least once in each week for six weeks, in one of the newspapers published in the county in which the land covered by said lease is located, or by serving a copy of said notice personally on the grantee, his heirs, executors, administrators, successors or assigns. The notice so to be published or served shall set forth the name of the person to whom said lease was granted, and, if known to the riparian commission, the name of the person or persons holding the same by devise, grant, assignment or otherwise, and shall particularly state that if the rentals in arrears and unpaid be not paid on or before the expiration of said six weeks, all rights under said lease shall determine, become null, void and of no effect and forfeited to the state of New Jersey. After such notice shall have been published or served as aforesaid, and entry shall have been made on the land described in said lease as herein directed the said board of riparian commissioners shall report to the state treasurer the fact of such publication, service and entry on said land, and in case the notice shall have been published, shall annex to said report a copy of such publication, and in case the notice shall be served personally, an affidavit by the person serving the same, proving the truth thereof. Upon the receipt of said report, it shall be the duty of the state treasurer to forthwith transmit to the board of riparian commissioners the original lease of the land on which entry shall have been

made, whereupon the board of riparian commissioners shall have power, in the manner now prescribed by law, to again lease or grant the said land as fully to all intents and purposes as if the said lease had never been made; provided, however, that all right or rights of action, at law or in equity, which had accrued to the state of New Jersey for the rentals in arrears and unpaid up to the expiration of the time fixed in said notice shall not abate, but the same shall remain of the same force and effect as if this act had not been passed. (P. L. 1906, p. 124.)

45. Responsibility of state treasurer as to leases; release.—Sec. 2. The state treasurer, upon returning to the riparian commissioners the lease of the land upon which entry had been made in the manner prescribed in the preceding section, shall be and hereby is released from all responsibility or obligation arising from said lease. (P. L. 1906, p. 125.)

46. Laying pipes under tidal waters; consent of governor and commissioners required.— Sec. 1. It shall be unlawful for any person or corporation to lay any pipe or pipes on any of the lands of the state lying under tidal waters without the consent or permission of the governor and the board of riparian commissioners of this state first had and obtained in writing; provided, that nothing in this act contained shall be construed to apply to lands under the waters of the Atlantic ocean. (P. L. 1910, p. 154.)

Joint Resolution relative to the riparian commission.

(P. L. 1870, p. 69. Rev. 1877, p. 987.)

47. Payments in discharge of leases; conveyance in fee simple.— Sec. 1. That the riparian commissioners may and shall, in all leases, as well those authorized by the eighth section as those authorized by the fourth section of the act of last year, relating to the subject of lands under water, covenant on behalf of the state that the state will at any time accept the capital sum of which the annual payment is the interest, at the rate of

seven per centum per annum, in lieu of all further annual payments, and make conveyance of the fee-simple and may convey or lease to any exterior line hereafter to be fixed; and such lease or conveyance under said eighth section and this resolution shall, in all respects, be as effectual to pass all the perquisites of wharfage and other like profits, tolls and charges, as conveyances and leases under the fourth section would be. (Rev. 1877, p. 987.)

48. Leases to which resolution applies.—Sec. 2. That this resolution shall take effect immediately, and operate upon leases and conveyances whether delivered or to be delivered. (Rev. 1877, p. 988.)

An Act relative to the riparian commission.

(P. L. 1871, p. 118. Rev. 1877, p. 988.)

Preamble.— Whereas, applications are frequently made to said commission for grants and leases of lands which were heretofore, but are not now, under tide-water, and it is desirable to quiet the possession of those who so apply, but doubts have arisen whether such cases are now provided for by law; and it has been found by experience that grants and leases containing the grants and covenants authorized by the fourth section of the act approved March thirty-first, one thousand eight hundred and Sixty-nine, entitled "Supplement to an act entitled 'An act to ascertain the rights of the state, and of riparian owners, in the lands lying under waters of the bay of New York, and elsewhere in the state,'" approved April eleventh, one thousand eight hundred and sixty-four, and the joint resolution of one thousand eight hundred and seventy, are more readily accepted, and are more satisfactory, than those which do not contain the same;

49. Covenants, clauses and conditions to be inserted in grants or leases of lands under water.— Sec. 1. That the said commissioners with the concurrence of the governor and attorney-general, in all cases of application for grants or leases of land now, or at the time of

the application, or at the time of the lease or grant, under tide-water; and in all cases of application for grants or leases of lands which are not now, or shall not at the time of the application, or at the time of the lease or grant be under tide-water, and in all cases of applications for leases or grants for all or any of such lands may, notwithstanding the first proviso in the fourth section of said supplement, or any other clause or matter in said supplement contained, grant or lease, or lease first with a covenant to grant, and grant afterwards, for such principal sum that the interest thereof at seven per centum will produce the rental, such lands, or any part thereof lying between what was, at any time heretofore, the original high-water line and the exterior lines established or to be established, and grant or lease in all cases in which, in their discretion, they shall think such grant or lease should be made, such rights, privileges and franchises as they are authorized to grant in cases coming directly within the said fourth section, and enter into the same covenant in the name of the state, in all cases of grants or leases where they deem such covenants proper, as are authorized in grants or leases under said fourth section and insert such other covenants, clauses and conditions in said grants or leases as they shall think proper to require from the grantee or lessee, or ought to be made by the state; provided, that nothing herein contained shall authorize grants or leases in front of a riparian owner to any other than such riparian owner, except upon the proceedings and conditions in said supplement provided; and provided also, that the applications for grants or leases, and the certificates of said commissioners, governor and attorney-general, may in the cases hereby provided for, vary from the provisions of the said supplement in such manner as to conform to this act, and any party who has already asked for or accepted a lease or conveyance may apply for and have the benefits of this act, notwithstanding such former application or former acceptance of a lease or conveyance. (Rev. 1877, p. 988.)

50. Salary of commissioners.—Sec. 2. That each commissioner shall receive ($1,500) fifteen hundred dollars per annum. (Rev. 1877, p. 988.)

An Act to re-organize the board of riparian commissioners of this state.

(P. L. 1894, p. 267.)

51. Board of riparian commissioners; members; appointment; term.—Sec. 1. That the board of riparian commissioners shall hereafter consist of the governor and four other commissioners, to be appointed by the governor by and with the advice and consent of the senate who shall hold their office for a term of five years and until their successors are qualified. (P. L. 1894, p. 267.)

52. Board to be non-partisan; vacancies.—Sec. 2. That not more than two of the appointees shall be members of the same political party, and in all subsequent appointments the same political status shall be maintained, and in case of a vacancy the appointment shall be for the unexpired term only. (P. L. 1894, p. 267.)

53. Terms of members of existing board ended.—Sec. 3. That the term of office of the members of the present board of riparian commissioners shall expire upon the passage of this act. (P. L, 1894, p. 267.)

54. Commissioners; compensation.—See. 4. That the compensation of the new commissioners and the powers and duties of the new board shall be the same as now provided by law. (P. L. 1894, p. 257.)

55. Repealer.—Sec. 5. That all acts or parts of acts by which any different number, term of office or mode of appointment of said commissioners is provided for, or which are in any way inconsistent with any of the provisions of this act be and the same are hereby repealed, and that this act shall take effect immediately. (P. L. 1894, p. 267.)

An Act to prohibit the riparian commissioners from granting any special oyster rights or privileges in Delaware bay.

(P. L. 1894, p. 809.)

56. Commissioners not to grant exclusive right to plant or take oysters in Delaware bay.—Sec. 1. That the riparian commissioners shall not have the right or power, in the name of the state or otherwise, by deed, grant, or lease, to give, grant or convey to any person or corporation the exclusive right or privilege to plant or take oysters from any part of Delaware bay. (P. L. 1894, p. 309.)

An Act to authorize the refunding of the consideration received by the state in certain cases where title to the lands lying under water conveyed by it or sought to be conveyed has wholly or partially failed, and to provide for reconveying such title to the state and releasing claims against it.

(P. L. 1898, p. 191.)

57. Claims of persons holding deeds from state for lands under water, conveyance of which has failed; appointment of commissioners; report; payment; reconveyance of rights to state.– Sec. 1. There shall be appointed by the governor of this state a commission to consist of three persons, who shall be citizens of this state, which commissioners shall have power, and it shall be their duty, to hear by petition or in any informal way, the claims of any person or persons, or their assigns, holding deeds to lands lying under water from the state of New Jersey, or under the authority of any law thereof, the conveyance of which deeds has failed and loss resulted thereform; and said commission shall also ascertain and determine what amount, if any, in their judgment, should be paid to such person or persons and make report thereon to the comptroller of this state, upon whose war-

rant to the treasurer of this state there shall be paid to such persons the amounts so ascertained and reported as aforesaid; provided, the same shall first be appropriated in the annual appropriation bill; and provided, the findings of said commission shall have first been approved by the governor, who may in his discretion, reverse, alter or change the same, or refer the same back to the commission for further ascertainment and report; and provided further, upon payment of the amount or amounts as aforesaid the state be released from any further claims, and the rights of such persons, if any, be reconveyed to the state. (P. L. 1898, p. 191.)

An Act to compel the determination of titles to riparian lands and lands under water in which the state claims an estate in remainder or reversion and to quiet the title to the same.

(P. L. 1907, p. 96.)

58. Determination of title to riparian lands or lands under water; suit in chancery; requisites of bill, etc.—See. 1. When a grant or conveyance in fee of riparian lands or lands under water, or both, has heretofore been made or shall hereafter be made by the state or by the riparian commission to any person or corporation who or which is in possession, or whose lessee or grantee is in possession, under a lease or an estate for years of the same lands, or any part thereof, which lease has not expired, or which estate for years has not terminated, and the state denies the validity of such grant or conveyance of the fee, and desires to contest it, the attorney-general is hereby authorized and empowered to bring and maintain a suit in chancery on behalf of the state to settle the title to said lands and to clear up all doubts concerning the same. The bill of complaint or information in such suit shall describe the lands with reasonable certainty; shall set forth that the state denies that the fee has passed by such grant or conveyance to the grantee; that it still resides in the state; and shall name the corporation, person

or persons who claim under said grant or conveyance in fee, and shall call upon such corporation, person or persons to set forth and specify its, his or their title, claim or encumbrance, and how and by what instrument or authority the same is derived or created. (P. L. 1907, p. 96.)

59. Statement of object of suit to be given with subpoena.—Sec. 2. With the subpoena in such suit there shall be issued a ticket to each defendant, describing the lands, stating the subject of the suit, and that if the defendant claims any title or interest to or encumbrance upon said lands, he is required to answer said bill, but not otherwise. (P. L. 1907, p. 96.)

60. Costs.—Sec. 3. No decree for costs shall be had in such suit against any defendant who suffers a decree pro confesso against him or who shall answer disclaiming all title to, interest in or encumbrance on said lands; but said court shall in such cases, without further proof, decree that such defendant or defendants have no estate or interest in or encumbrance on said lands, or any part thereof, by such grant or conveyance in fee; and any defendant who shall by answer duly verified by oath deny that he claims or ever has claimed or pretended to have any estate or interest in fee in or upon said lands, or any part thereof, shall be entitled to his costs in said suit. (P. L. 1907, p. 97.)

61. Answer of defendant; claim to be specified.—Sec. 4. If any defendant shall answer claiming any interest or estate in fee in said lands, or any part thereof, he shall in such answer specify and set forth the estate or interest so claimed, and if not claimed in whole of said lands, he shall specify and describe the part in or upon which the same is claimed, and shall set out the manner in which and the sources through which such title or interest is claimed to be held and derived. (P. L. 1907, p. 97.)

62. Issue at law to settle validity of claim.—Sec. 5. Upon application of either party, an issue at law shall

be directed to try the validity of such claim or to settle the facts or any specified portion of the facts upon which the same depends, and the court of chancery shall be bound by the result of such issue, but may, for sufficient reasons, order a new trial thereof according to the practice in such cases; and when such issue is not requested, or as to the facts for which the same is not requested, the court of chancery shall proceed to inquire into and determine such claims, interest or estate according to the course and practice of said court; and shall, upon the finding of such issue, or upon such inquiry and determination, finally settle and adjudge whether the said defendant has any estate, interest or right in said lands, or any part thereof, by virtue of said grant or conveyance in fee, and what such interest, estate or right is, and in and upon what part of said lands the same exists. (P. L. 1907, p. 97.)

63. Final decree to settle rights of parties; terms of decree.—Sec. 6. The final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit. It shall not be necessary for the attorney-general on behalf of the state to make or offer to make any tender or payment into court on or before the filing of the bill or information, but if the decree of the court shall be in favor of the state, the court shall determine and decree upon what equitable terms the said grant or conveyance in fee shall be set aside and declared void and of no effect. (P. L. 1907, p. 97.)

No. 134, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

BRIEF IN OPPOSITION TO DELAWARE'S MOTION FOR APPOINTMENT OF SPECIAL MASTER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

I. THE COURT DOES NOT REQUIRE A SPECIAL MASTER IN CASES THAT CAN BE DECIDED BY THE COURT ON THE EXISTING RECORD AFTER ARGUMENT 1

II. NEW JERSEY IS ENTITLED TO JUDGMENT, AND A SPECIAL MASTER IS NOT REQUIRED, BECAUSE NO MATERIAL FACTS ARE IN DISPUTE AND NO FURTHER DISCOVERY IS NEEDED 4

A. Because the 1905 Compact is Unambiguous, Extrinsic Evidence Is Unnecessary for a Determination on the Merits. 6

B. Delaware Has Engaged in Ample Fact Finding Already and Has Failed to Specify How Any Further Discovery Will Make a Difference. 6

C. This Court's Decision in *Virginia v. Maryland* Effectively Resolved the Issues Raised Here 13

III. THE CASE SHOULD BE ARGUED THIS TERM 17

APPENDIX

Exhibit A, Letter from New Jersey Deputy Attorney General Rachel Horowitz to Max Walton, Special Counsel for Delaware, Dated October 19, 2005. .....1a

Exhibit B, Letter from New Jersey Deputy Attorney General Rachel Horowitz to Matthew Boyer, Special Counsel for Delaware, Dated October 21, 2005.....8a

TABLE OF AUTHORITIES

Page

CASES [1]

Arkansas v. Tennessee, 246 U.S. 158 (1918)..... 17

Arkansas v. Tennessee, 310 U.S. 563 (1940) 15

Arizona v. California, 292 U.S. 341 (1934)..... 9

California ex rel. State Lands Comm'n v. United States, 457 U.S. 273 (1982) 4

California v. Nevada, 447 U.S. 125 (1980) 15

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 11

City of Sherrill v. Oneida Indian Nation, 125 S. Ct. 1478 (2005) 17

Crow Tribe of Indians v. Racicot, 87 F.3d 1039 (9th Cir. 1996) 9-10

Cuyler v. Adams, 449 U.S. 433 (1981) 6

Edwards v. Aguillard, 482 U.S. 578 (1987) 9

Georgia v. South Carolina, 497 U.S. 376 (1990) 15

Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386 (Fed. Cir. 1989) 4, 5

Louisiana v. Mississippi, 202 U.S. 1 (1906) 15

Maryland v. West Virginia, 217 U.S. 1 (1910) 15

Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 142 F.3d 26 (1st Cir. 1998) 5

Nebraska v. Wyoming, 507 U.S. 584 (1993) 4, 15

New Hampshire v. Maine, 532 U.S. 742 (2001) 3

New Jersey v. Delaware, 291 U.S. 361 (1934) 1

New Jersey v. New York, 523 U.S. 767 (1998) 6, 14, 15

Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92 (1st Cir. 1997) 9

Ohio v. Kentucky, 410 U.S. 641 (1973) 1-2, 15

Oklahoma v. New Mexico, 501 U.S. 221 (1991)..... 6, 9

Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591 (1846) 15

Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988) 10

Texas v. New Mexico, 462 U.S. 554 (1983)..... 6, 15

United States v. Alaska, 503 U.S. 569 (1992)..... 4

United States v. California, 332 U.S. 19 (1947)..... 2

United States v. Louisiana, 339 U.S. 699 (1950)..... 2

United States v. Texas, 339 U.S. 707 (1950) 2-3

Vermont v. New Hampshire, 289 U.S. 593 (1933) 15

Virginia v. Maryland, 540 U.S. 56 (2003)..... *passim*

Virginia v. Tennessee, 148 U.S. 503 (1893) 15

STATUTES, REGULATIONS AND RULES

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907) (1905 Delaware-New Jersey Compact) ..... *passim*

Natural Gas Act, 15 U.S.C. §§ 717 et seq.:
§ 3(a), 15 U.S.C. § 717b(a) 11

Fed. R. Civ. P. 56(a) 4

Fed. R. Civ. P. 56(c) 4

Fed. R. Civ. P. 56(f) 5

18 C.F.R. § 385.214(a)(2) (2005) 12

LEGISLATIVE MATERIALS

Del. Sen. Journal 898 (1903) 9

H.R. Doc. No. 59-43 (1905) 9

H.R. Rep. No. 59-6440 (1907) 9

S. Doc. No. 59-260 (1906) 9

ADMINISTRATIVE MATERIALS

Federal Energy Regulatory Commission:

Letter of John Hughes, Secretary, Delaware Department of Natural Resources and

Environmental Control, to Magalie R. Salas, Federal Energy Regulatory Commission, dated June 7, 2005, FERC Docket CP04-411-000 (filed June 28, 2005) 12

Motion to Intervene For Party Status of Delaware Department of Natural Resources & Environmental Control Re Crown Landing, FERC Docket CP04-411-000 (filed Oct. 14, 2004) 11

Exhibit A, Letter from Rachel Horowitz, Deputy Attorney General of New Jersey, to Max Walton, Special Counsel for Delaware, dated Oct. 19, 2005 6-7

Exhibit B, Letter from Rachel Horowitz, Deputy Attorney General of New Jersey, to Matthew Boyer, Special Counsel for Delaware, dated Oct. 21, 2005 7

OTHER MATERIALS

Delaware Public Archives Record Group 0750, Subgroup 000, Series 001 (New Jersey Versus Delaware Boundary Suit Exhibits)..... 8

New Jersey-Delaware Boundary Case, New Jersey State Library, Call No. 974.90 B765, 1934 (19 vols.)..... 8

Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, *New Hampshire v. Maine*, No. 130, Orig., 2000 WL 33324606 (U.S. Oct. 10, 2000)..... 3

Report of the Special Master, *Virginia v. Maryland*, No. 129, Orig. (Dec. 9, 2002) 14

United States National Archives & Records Admin., Record Group 267, Boxes 155-165 (*New Jersey v. Delaware*, No. 11, Orig.). 8

SUMMARY OF ARGUMENT

The Court's object in original cases is to have the parties, "as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). Although the Court frequently appoints a special master, it has also chosen not to do so in cases where the Court was fully capable of resolving the dispute after briefing and argument. This is such a case.

New Jersey is entitled to judgment in its favor because Article VII of the Compact unambiguously confers exclusive State riparian jurisdiction on New Jersey; because Delaware is judicially estopped from claiming otherwise due to its litigation position in *New Jersey v. Delaware*, 291 U.S. 361 (1934) (No. 11, Orig.); and because this Court's decision in *Virginia v. Maryland*, 540 U.S. 56 (2003), provides clear guidance to resolve the issues presented. New Jersey has already responded fully and voluntarily to Delaware's discovery, and Delaware cannot identify any material issue of fact that is disputed, or specify how any further discovery is likely to reveal any such disputed material fact. Consequently, the Court should decide this case without appointing a special master.

I. THE COURT DOES NOT REQUIRE A SPECIAL MASTER IN CASES THAT CAN BE DECIDED BY THE COURT ON THE EXISTING RECORD AFTER ARGUMENT.

In its Motion to Reopen and for a Supplemental Decree, New Jersey asked that this case be decided on its merits, without the appointment of a special master. The Court decided to treat this matter as a new action, but left

open the question of how this action was to proceed beyond the filing of an Answer by Delaware. Delaware now moves for the appointment of a special master. Delaware, however, advances no factual issues calling for further discovery or the introduction of extrinsic evidence. Therefore, Delaware's motion should be denied.

This Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. at 644. To this end, the Court will, where feasible, "dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Id.*

While it is true that the Court frequently appoints a special master in original actions, it has proceeded directly to final decision where warranted. For example, in *United States v. Texas*, 339 U.S. 707 (1950) (No. 13, Orig.), the United States invoked this Court's original jurisdiction to establish its exclusive ownership of the marginal sea in the Gulf of Mexico, which lies below the low-water mark on the Texas coast. Although the Court had decided similar cases in favor of the United States, *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950), Texas argued that the unique sovereignty enjoyed by the Republic of Texas prior to admission to the Union warranted a different result. 339 U.S. at 712-14.

Texas urged the appointment of a special master "to take evidence and report to the Court." *Id.* at 712. The Court denied Texas's request, reasoning that it could decide the case on the basis of the "equal footing" doctrine, which

had been applied to resolve questions of ownership of the marginal sea in *California* and *Louisiana*. *Id.* at 716-20.

Similarly, the Court resolved *New Hampshire v. Maine*, 532 U.S. 742 (2001) (No. 130, Orig.), without appointing a special master. In response to a motion by Maine to dismiss its complaint, New Hampshire argued that the determination as to the correct historical border between the States "cannot properly be made on the record submitted by Maine . . . ." *See* Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, *New Hampshire v. Maine*, No. 130, Orig., 2000 WL 33323606 *1 & n. 1 (U.S. Oct. 10, 2000). New Hampshire further requested that, if the Court determined that the issue of res judicata could not be decided without reference to disputed evidence, the motion "be submitted to a master for hearing with leave granted to Maine to renew its motion after hearing." *Id.* Nevertheless, the Court ruled on the merits of Maine's motion, holding that New Hampshire was judicially estopped from claiming that its boundary in the Piscataqua River ran along Maine's shoreline because New Hampshire had taken a contrary litigating position in the 1970s in Original, No. 64. *New Hampshire v. Maine*, 532 U.S. at 755.

The Court should follow the same procedure here because this case can be decided based on the unambiguous language of Article VII of the Compact of 1905, as interpreted in light of the clear guidance provided by the Court's recent decision in *Virginia v. Maryland*, 540 U.S. 56.

II. NEW JERSEY IS ENTITLED TO JUDGMENT, AND A SPECIAL MASTER IS NOT REQUIRED, BECAUSE NO MATERIAL FACTS ARE IN DISPUTE AND NO FURTHER DISCOVERY IS NEEDED.

Delaware characterizes New Jersey's opening motion in this action, together with its accompanying affidavits, as "functionally a motion for summary judgment . . . ." (Del. Mot. at 2-3). Indeed, New Jersey's request for relief, like a case for summary judgment, presents no disputes of material fact and can be resolved as a matter of law. Summary judgment motions are proper and not uncommon in original action cases. *See, e.g., United States v. Alaska*, 503 U.S. 569, 575 (1992); *see also Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (No. 108, Orig.) ("although not strictly applicable, Rule 56(c) of the Federal Rules of Civil Procedure and our precedents construing that Rule serve as useful guides."); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982) (No. 89, Orig.) ("No essential facts being in dispute, a special master was not appointed and the case was briefed and argued.")

Summary judgment is permissible "at any time after the expiration of 20 days from the commencement of the action." Fed. R. Civ. P. 56(a). A motion for summary judgment will not be defeated by mere speculation on the part of the opposing party that that it might, after discovery, establish facts entitling it to relief. *E.g., Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989). A party opposing summary judgment is required to demonstrate by affidavit that summary judgment is inappropriate, either because material facts are disputed, or

because the party is presently unable to "present by affidavit *facts essential* to justify [that party's] opposition." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 n.6 (1986) (quoting Fed. R. Civ. P. 56(f) (emphasis added)). Such an opposition must demonstrate "a plausible basis for the movant's belief that previously undisclosed or undocumented facts exist . . . and that, if obtained, there is some credible prospect that the new evidence will create a trialworthy issue." *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 44 (1st Cir. 1998).[1]

Although Delaware urges the need for a special master, it has failed to point to any issues of disputed fact or ambiguities in the language of the Compact of 1905 that require resort to extrinsic evidence. To the contrary, the materials that Delaware seeks to discover with the assistance of a special master are neither necessary nor useful to the task of interpreting the Compact's clear and unambiguous terms. It is therefore appropriate to proceed to a determination of this issue without the appointment of a special master.

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[1] *See also, e.g., Keebler*, 866 F.2d at 1389 ("If all one had to do to obtain a grant of a Rule 56(f) motion were to allege possession by movant of 'certain information' and 'other evidence,' every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files.").

A. Because the 1905 Compact is Unambiguous, Extrinsic Evidence Is Unnecessary for a Determination on the Merits.

When Congress ratified the Compact of 1905, 34 Stat. 858 (1907), that compact was "'transform[ed] . . . into a law of the United States,'" *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). "Just as if a court were addressing a federal statute, then, the 'first and last order of business' of a court addressing an approved interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983); *Virginia v. Maryland*, 540 U.S. at 66.

Where a Compact is unambiguous, its legislative history and evidence of the parties' subsequent course of performance are irrelevant. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); *see also New Jersey v. New York*, 523 U.S. at 784 n.6. New Jersey has previously briefed its position that the 1905 Compact unambiguously granted New Jersey exclusive riparian jurisdiction along its own shoreline (N.J. Br. 24-27; N.J. Rep. Br. 11-19), and that the legislative history and course of performance evidence, although helpful to New Jersey's position, is immaterial (N.J. Rep. 19-28.)

B. Delaware Has Engaged in Ample Fact Finding Already and Has Failed to Specify How Any Further Discovery Will Make a Difference.

New Jersey voluntarily provided extensive discovery in response to twenty-three separate document requests propounded by Delaware. (*See* Ex. A, Letter from Rachel

Horowitz, New Jersey Deputy Attorney General, to Max Walton, Special Counsel for Delaware, dated Oct. 19, 2005, at App. 1a-7a). The topics were wide-ranging, including the 1905 Compact (No. 21), wharfing and use of subaqueous lands within the Twelve-Mile Circle (Nos. 17-18), files for specific projects (Nos. 1-12), and communications between New Jersey and Delaware concerning activities within the Twelve-Mile Circle (No. 12). On October 21, 2005, New Jersey forwarded its Record and Transcript in *New Jersey v. Delaware I* (No. 1, Orig.), in response to a verbal request on behalf of Delaware made during New Jersey's production of documents on October 5-6, 2005. (*See* Ex. B, Letter from Rachel Horowitz, New Jersey Deputy Attorney General, to Matthew Boyer, Esq., Special Counsel for Delaware, dated October 21, 2005, App. at 8a-9a.)

In its October 27, 2005 brief, Delaware complained not that New Jersey had withheld anything from Delaware, but that Delaware had not yet had an opportunity to review the "significant amount of documents" that New Jersey provided. (Del. Br. 76 n.42.) Delaware has now had that opportunity, but is unable to specify how any further discovery will generate any particular material issue of fact precluding judgment for New Jersey.

Delaware offers several examples of work in progress to justify the need for further delay, discovery, and the appointment of a special master. None of its arguments is persuasive. First, Delaware says it is "still" compiling the "previous litigation records in the previously filed actions by New Jersey . . . ." (Del. Mot. 4). However, notwithstanding this claim, Delaware's Lodging, filed on October 28, 2005, copied liberally from the record in both Original, No. 1 and Original, No. 11. The Delaware State Archives also

maintains copies of the transcript and exhibits in Original, No. 11,[2] as do both the New Jersey State Library[3] and the National Archives.[4] Delaware has had ample time to "compile" the previous litigation record since New Jersey filed its opening brief here more than five months ago.

Second, Delaware claims it wants more time to scour other archival files and library sources to uncover additional history relating to the 1905 Compact. (Del. Mot. 6.) Delaware says that "[s]uch documents, *if* they can be found, may be critical to resolving *any* issues of disputed fact over the proper interpretation of the 1905 Compact." (*Id.*) (emphasis added).

This request lacks merit because Delaware has failed to point to "any issues of disputed fact" or any ambiguity in the language of the Compact that requires resort to extrinsic documents. In addition, the history of the 1905 Compact is already well known to the States, and Delaware has not pointed to any specific material gaps in that knowledge that require further historical research to understand the plain language of the agreement. The respective New Jersey and Delaware legislative enactments relating to the Compact are a matter of public record. The principal documents were

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[2] *See* Delaware Public Archives Record Group 0750, Subgroup 000, Series 001 (New Jersey Versus Delaware Boundary Suit Exhibits).

[3] New Jersey-Delaware Boundary Case, New Jersey State Library, Call No. 974.90 B765, 1934 (19 vols.).

[4] United States National Archives & Records Admin., Record Group 267, Boxes 155-165 (*New Jersey v. Delaware*, No. 11, Orig.).

included in Exhibits 161 and 162 in Original, No. 11. Exhibit 161 specifically included the report of the New Jersey commissioners. (*See* N.J. Supp. App. 27a.) The Delaware Commissioners' report also exists. *See* Del. Sen. Journal 898 (1903). The legislative history relating to Congress' ratification of the Compact is also a matter of record. *See* H.R. Doc. No. 59-43 (1905); S. Doc. No. 59-260 (1906); H.R. Rep. No. 59-6440 (1907); Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907).

Delaware fails to explain what other legislative history it expects to find, what Delaware thinks that will show, or how it could alter the plain language of the Compact. Even assuming for the sake of argument that the Compact were ambiguous, and assuming that Delaware could unearth previously undiscovered correspondence from the Compact's drafters, "[i]t is beyond cavil that statements allegedly made by, or views allegedly held by, 'those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body,' are of little use in ascertaining the meaning of compact provisions." *Oklahoma v. New Mexico*, 501 U.S. at 236 (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)).

Third, Delaware argues that further delay is required because it might wish to proffer "the opinions of expert witnesses on water law." (Del. Mot. 7.) That argument too should be rejected. Neither this Court nor lower federal courts will defer to the legal opinions offered by a party's "expert" on the proper interpretation of a statute or the contours of American law. *E.g., Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (collecting cases); *Crow Tribe*

of Indians v. Racicot, 87 F.3d 1039, 1045 (9th Cir. 1996) ("Expert testimony is not proper for issues of law."); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) ("There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge . . . . To allow anyone other than the judge to state the law would violate the basic concept.") (internal quotation marks, citation omitted; alteration in original).

Fourth, Delaware says it wishes to take discovery concerning New Jersey's riparian grants in the Twelve-Mile Circle. (Del. Mot. 8.) However, Special Master Rawls compiled the evidence of New Jersey grants from 1854 through 1929, including witness testimony about most of them, as part of the record in Original, No. 11. (N.J. App. 30a-47a.) The first five riparian grants, from 1854 through 1871, were embodied in acts of the New Jersey legislature. (N.J. App. 31a-33a.) The next 37 -- dating from 1883 through 2001 -- consist of instruments that were recorded in the New Jersey Bureau of Tidelands Management. (*Id.*, 34a-50a.)

New Jersey already produced its files to Delaware last September (*see* Ex. A (Nos. 17-18) at App. 5a), and Delaware has failed to explain how any further discovery concerning these grants could generate a disputed issue of material fact relevant to determining whether Article VII of the 1905 Compact gave New Jersey exclusive State riparian jurisdiction on the New Jersey side of the River. Further discovery would be a waste of time, particularly since Delaware concedes that it did not grant any rights on the New Jersey side of the River at any time prior to 1962. (Del. App. 66a ¶ 3; Del. Ans. ¶ 25.)

Finally, Delaware claims that further delay is needed because it wants discovery about the "true nature and scope" of BP's Crown Landing project. (Del. Mot. 9.) This case, however, is not about whether the BP/Crown Landing Project is in the public interest or should be constructed. That determination will be made by FERC, other responsible federal agencies, and New Jersey, if it prevails. In addition, Delaware's concerns can continue to be considered through the federal permitting process.[5] The question presented here is simply whether the Compact of 1905 conferred upon New Jersey exclusive State riparian jurisdiction over improvements on the New Jersey side of the Delaware River. The Court is fully capable of resolving that question on the existing record after argument.

Moreover, Delaware already is fully informed about the size, nature and scope of the Crown Landing project, from many sources. New Jersey answered Delaware's document requests about the project. (Ex. A (Nos. 1, 15) at 1a, 4a.) Delaware is currently a party intervenor in the federal regulatory review of the project being conducted by the Federal Energy Regulatory Commission ("FERC") under § 3(a) of the Natural Gas Act,[6] has access to FERC's

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[5] If New Jersey prevails here, the federal permitting process will continue to provide Delaware with a satisfactory, impartial forum in which to raise any concerns it may have about the construction of particular improvements appurtenant to the New Jersey shoreline. *Accord, City of Milwaukee v. Illinois*, 451 U.S. 304, 326 (1981) ("The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process").

[6] *See* Motion to Intervene For Party Status of Delaware Department of Natural Resources & Environmental Control Re Crown

electronic library,[7] and continues to be an active participant in the federal regulatory review.[8] Delaware also conducted its own regulatory review of the project when it refused to issue its coastal zone act permit for the pier. (Del. Br. 14-15.) Thus, Delaware's claim that it needs to take more discovery about the project is meritless.

Delaware lastly accuses New Jersey of seeking a speedy resolution of this case in order to facilitate the construction of the Crown Landing project. (Del. Mot. 9.)[9] New Jersey, however, simply seeks to avoid the delay and needless expense that would result from unnecessarily prolonging a matter than can be resolved without further discovery. *See Ohio v. Kentucky*, 410 U.S. at 644.

Landing, FERC Docket CP04-411-000 (filed Oct. 14, 2004). *See also* 18 C.F.R. § 385.214(a)(2) (2005) (intervention of right by state agencies).

[7] The docket and contents of all public records may be viewed at http://elibrary.ferc.gov/idmws/docket_search_consol.asp, by entering "CP04-411" in the "Docket Number" field.

[8] *E.g.*, Letter of John Hughes, Secretary, Delaware Department of Natural Resources and Environmental Control, to Magalie R. Salas, Federal Energy Regulatory Commission, at 2, dated June 7, 2005, FERC Docket CP04-411-000 (filed June 28, 2005) ("It is our expectation that FERC will take very seriously not only our jurisdiction over this project but our denial of the Coastal Zone Permit required under Delaware law, and will therefore withhold approval of the project.").

[9] Although the project is supported by the New Jersey Board of Public Utilities as a means to increase the "vital" supply of natural gas to New Jersey (N.J. Br. 13), Delaware's refusal to allow sediment sampling in the riverbed has prevented the New Jersey Department of Environmental Protection from completing its own regulatory review of the project (N.J. Rep. Br. 8).

C. This Court's Decision in *Virginia v. Maryland* Effectively Resolved the Issues Raised Here.

A special master is also unnecessary in this case because, as New Jersey has previously explained, the Court's decision in *Virginia v. Maryland,* 540 U.S. 56, provides controlling legal guidance. (*See* N.J. Rep. Br. 14-19.) Article VII of the 1905 Compact sets forth its jurisdictional grants even more clearly than did its counterpart in the Virginia-Maryland Compact of 1785. The 1785 Compact granted the "citizens" of both States "full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements," *id.* at 62, and said nothing expressly about Virginia's riparian jurisdiction. Nonetheless, this Court held that the 1785 Compact, "which governs the rights of the Commonwealth of Virginia," conferred *exclusive* riparian jurisdiction on Virginia over projects extending across the Potomac River boundary into Maryland. *Id.* at 79 (declaring Virginia's right to construct improvements and withdraw water "free of regulation by Maryland"). The 1905 Compact, by contrast, *explicitly* granted New Jersey, "on its own side of the river," the right "to continue to exercise riparian jurisdiction of every kind and nature . . . ." (N.J. App. 5a.)

Virginia v. Maryland also definitively addressed the affirmative defenses of estoppel, waiver, consent and laches that Delaware has raised in its answer. (Del. Ans. 12.) Maryland raised the same affirmative defenses, all of which

are variants of the doctrine of "prescription and acquiescence."[10] This doctrine requires the party invoking it to prove "a long and continuous . . . assertion of sovereignty" and the other State's "acquiescence in her prescriptive acts." 540 U.S. at 76 (quoting *New Jersey v. New York*, 523 U.S. at 807). In *Virginia v. Maryland*, the Court observed that the period of time for Maryland's prescriptive acts was arguably too short as a matter of law, but ruled that Virginia, in any case, had asserted her compact rights in the mid-1970s, which alone was sufficient to defeat Maryland's claim. *Id.* at 76-79.

Judgment in favor of New Jersey is proper because Delaware's defenses fail as a matter of law and can be decided on the basis of undisputed material facts. First, this Court's decisions in cases like *Virginia v. Maryland* provide an ample basis upon which to conclude that Delaware's claims of prescription and acquiescence are premised on a period of time that is legally too short. Although the Court has not established a minimum time period, the period must be "substantial." *Id.* at 76; *New Jersey v. New York*, 523 U.S. at 786. Most cases applying the doctrine have involved

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[10] Maryland argued that Virginia had acquiesced in hundreds of permits and authorizations issued by Maryland to Virginia municipalities and citizens from 1957 through 2000, without any objection from Virginia; that Virginia had never had its own permitting system; and that Virginia officials had even participated in Maryland's development in 1987 of a tidal wetlands licensing requirement for Virginia riparian owners. Report of the Special Master at 82-92, *Virginia v. Maryland*, No. 129, Orig. (Dec. 9, 2002); *see also Virginia v. Maryland*, 540 U.S. at 76.

periods approaching or exceeding 100 years.[11] In *New Jersey v. New York*, the Court observed that a period of 60 years was "enough to open the door to litigation . . . ." 523 U.S. at 790. In *Virginia v. Maryland*, in which the period was 43 years (1957-2000), the Court said that "only once before have we deemed such a short period of time sufficient to prove prescription in a case involving our original jurisdiction. *See Nebraska v. Wyoming*, 507 U.S. 584, 594-595 (1993) (41 years)." 540 U.S. at 77. The Court cautioned, however, that because an alternative basis supported the decision in *Nebraska v. Wyoming*, "it is far from clear that such a short prescriptive period is sufficient as a matter of law." *Id.*[12]

In this case, Delaware concedes that it did not issue any grant or lease for any improvement on the New Jersey

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[11] *See Georgia v. South Carolina*, 497 U.S. 376, 391-93 (1990) (160 years); *California v. Nevada*, 447 U.S. 125, 126-32 (1980) (80 years); *Ohio v. Kentucky*, 410 U.S. at 645-52 (151 years); *Arkansas v. Tennessee*, 310 U.S. 563, 566, 569-72 (1940) (114 years); *Vermont v. New Hampshire*, 289 U.S. 593, 615-20 (1933) (121 years); *Maryland v. West Virginia*, 217 U.S. 1, 41-44 (1910) (103 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (90 years); *Virginia v. Tennessee*, 148 U.S. 503, 505, 524 (1893) (85 years); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638 (1846) (125 years).

[12] New Jersey reserves the right to argue that the doctrine of prescription and acquiescence is unavailable to divest a State of a federally approved compact right. *See, e.g., New Jersey v. New York*, 523 U.S. at 811 ("'unless the compact to which Congress has consented is somehow unconstitutional,' no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.") (*quoting Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

side of the River until 1962. (Del. Ans. ¶ 25; Del. App. 66a.) Moreover, Delaware's activities in 1962 and 1963 are irrelevant, because they related to grants for pipelines that crossed from one side of the River to the other, (Del. App. 66a-67a), and, as such, required permission of both states. (N.J. Rep. Br. 13 n.6). These approvals by nature are not prescriptive acts.

The first grant by Delaware for a riparian improvement on the New Jersey side did not occur until 1971, when the DuPont Company accepted a subaqueous land lease from Delaware, under protest, to construct a dock. (Del. App. 67a; N.J. Rep. Br. 24.) Since this action was the first by Delaware involving riparian jurisdiction along the New Jersey shoreline, any period of alleged prescriptive activity commenced in 1971, and hence amounts only to 34 years (1971-2005). Further, even if the claimed period of prescription is based on the 1962 actions involving pipelines, it still would be only 43 years (1962-2005), the same period identified as likely inadequate as a matter of law in *Virginia v. Maryland*.

Moreover, Delaware identifies only eleven instances since adoption of the 1905 Compact in which it claims, beginning in 1962, to have exercised jurisdiction on New Jersey's side of the river. This stands in sharp contrast to New Jersey's history of exercising jurisdiction over riparian lands, including those in the Twelve Mile Circle, commencing in the 1800's. (N.J. Br. 8-10). Since the adoption of the 1905 Compact, New Jersey has exercised its jurisdiction to approve tidelands conveyances on at least thirty-three occasions. (*Id.* at 9.)

The fact that Delaware did not even begin to issue grants or leases on the New Jersey side of the River until 1962 undercuts its claim that it has somehow always enjoyed jurisdiction over New Jersey's riparian activities. *E.g., City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1492 (2005) ("When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations.") (footnote omitted). Similarly, Delaware's failure to assert prescriptive activities legally adequate to support its claims is demonstrated by the fact that, since 1935, Delaware law has prevented the City of Wilmington, Delaware, from taxing any riparian properties on the New Jersey side of the River, pending a "final determination" of the question of Delaware's authority under the Compact of 1905, whether by agreement between the two States or "a final Court adjudication." (N.J. Rep. Br. 25; N.J. Supp. App. 14a, 21a.) Delaware's law thus recognizes that New Jersey continued to dispute its authority. *E.g., Arkansas v. Tennessee*, 246 U.S. 158, 172 (1918) ("These acts, far from treating the boundary as a line settled and acquiesced in, treat it as a matter requiring to be definitely settled, with the cooperation of representatives of the sister State if practicable, otherwise by appropriate litigation.").

Because these issues can be resolved by this Court as a matter of law based on undisputed facts, it is unnecessary to appoint a special master.

III. THE CASE SHOULD BE ARGUED THIS TERM.

Delaware has not identified any disputed issues of material fact that bear on whether the Compact of 1905 gives

New Jersey exclusive State riparian jurisdiction on its own side of the Delaware River. Thus, the facts raised by Delaware and the affirmative defenses asserted in her answer do not necessitate the appointment of a special master. Instead, this matter should proceed to argument and decision this term, based on the clear and unambiguous language of the Compact of 1905.

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January 4, 2006

EXHIBIT A – LETTER FROM RACHEL HOROWITZ, NEW JERSEY DEPUTY ATTORNEY GENERAL, TO MAX WALTON, SPECIAL COUNSEL FOR DELAWARE, DATED OCT. 19, 2005

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

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October 19, 2005

By Overnight Mail

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Re: State of New Jersey v. State of Delaware

Dear Mr. Walton:

In response to Delaware's letter of August 25, 2005, requesting documents with regard to this matter, I am writing to confirm that the documents referenced in the letter of

August 25 were produced as set forth below. In addition, I am enclosing with this letter copies of documents that were not previously produced, along with privilege logs. As you are aware, after the August 25 document request was made, Delaware's time to respond to New Jersey's motion was extended to October 27, 2005; consequently, the timeframe requested for document production in Delaware's letter of August 25 was extended by mutual consent.

The documents referenced in the letter of August 25 were produced as follows:

1. Files for the British Petroleum and/or Crown Landing LLC LNG project as well as New Jersey's proposal to construct any part of the project: Produced for inspection and copying on October 5 and 6, 2005; Remaining documents not produced on those dates are enclosed with this letter.

2. Any other proposals to build a LNG facility on lands in New Jersey extending into the Delaware River, including El Paso Eastern Company's proposal between 1969 and 1974: No files located.

3. The Sun Oil Company of Pennsylvania or the Sun Oil Company regarding Delaware's coastal zone or for activities within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

4. New Jersey's application to Delaware for permission to construct facilities in the Delaware River at

Fort Mott State Park: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

5. Sunolin Chemical Company's request to construct pipelines in Logan Township, New Jersey to cross the Delaware River: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

6. Colonial Pipeline Company's request to construct pipelines in Logan Township, New Jersey to cross the Delaware River: produced for inspection and copying on September 14, 2005 and September 23, 2005.

7. Columbia Gas Transmission Corporation's request to construct pipelines in New Jersey to cross the Delaware River: No files located.

8. E.I. DuPont de Nemours &. Co.'s requests to perform work on, above, or in the Delaware River within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

9. Keystone Cogeneration Systems, Inc.'s request for approval of a coal unloading pier and facility in Logan Township, New Jersey: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

10. Sunoco, Inc.'s request, to maintain pipelines to cross the Delaware River: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

11. Fenwick Common, LLC's request, for permission to construct the Penns Grove Riverfront and Pier,

in Perms Grove, New Jersey: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

12. Any request to Delaware by representatives of New Jersey for permission to conduct any activities in the Delaware River within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

13. Documents reflecting any discussions by representatives of New Jersey with representatives of Delaware regarding New Jersey's development of its coastal zone management plan dated August 1980, and any updates: Produced for inspection and copying on October 5 and 6, 2005; one remaining document enclosed with this letter.

14. Documents relating to any submission by New Jersey to any Federal agency regarding New Jersey's or Delaware's jurisdiction to regulate activities within the 12 mile circle, including submissions to the National Oceanic and Atmospheric Administration: Produced for inspection and copying on October 5 and 6, 2005.

15. Documents submitted to the Federal Energy Regulatory Commission (FERC) for any proposed project within the 12 mile circle, including any submissions related to the proposed British Petroleum/Crown Landing, LLC's LNG facility: Produced for inspection and copying on October 5 and 6, 2005; remaining documents enclosed with this letter.

16. Documents regarding Delaware's Coastal Zone Act: Produced for inspection and copying on October 5 and 6, 2005.

17. Documents relating to any use of subaqueous lands within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

18. Documents relating to wharfing within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

19. Documents relating to any communication with the Army Corps of Engineers for any use of subaqueous lands within the 12 mile circle: Produced for inspection and copying on September 14, 2005 and September 23, 2005.

20. Documents relating to any communications with the Delaware River Basin Commission regarding New Jersey's or Delaware's jurisdiction and/or authority to regulate any activities within the 12 mile circle: Produced for inspection and copying on September 23, 2005, and October 5 and 6, 2005.

21. Documents relating to the negotiation or adoption of the 1905 Compact between New Jersey and Delaware: Produced for inspection and copying on September 23, 2005.

22. Documents relating to any proposed agreement between British Petroleum and/or Crown Landing, LLC and New Jersey relating to the proposed LNG facility within the 12 mile circle; Produced for inspection and copying on

October 5 and 6, 2005; remaining documents enclosed with this letter (bates stamped NJ0001-NJ0389).

23. All opinions (formal and informal) relating to New Jersey's or Delaware's authority to regulate activities (including riparian or subaqueous activities) within the 12 mile Circle: Produced for inspection and copying on September 23, 2005.

This letter and enclosures conclude New Jersey's response to Delaware's letter of August 25, 2005.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF
NEW JERSEY

By: s/ Rachel Horowitz
Rachel Horowitz
Deputy Attorney General

c: Ryan Newell, Esq.

Enc.: Plaintiff's Privilege Log
NJEDA list of documents produced, with privilege log

Remaining documents responsive to no.s 1 and 22 above: NJEDA documents, bates stamped NJ0001-NJ0389
USCG Navigation and Vessel Inspection Circular No. 05-05, bates stamped NJ0390-NJ0436

Crown Landing LLC, Draft Environmental Resource Report, July 2004, Volume IV, Binders IVA and IVB; and Volume III, Binder IIIA
Critical Wildlife Habitat Plan, reissued 4-18-05
Vegetation Management Plan, reissued 4-18-05
Waterfront Development Area - Environmental Sensitivity, reissued 4-18-05
Surveyed Wetlands, Sunoco Site, revised Nov. 14, 2003

Remaining document responsive to no. 13 above:
Memo to State Coastal Program Managers from Clement Lewsey, NOAA, dated July 2, 1993, with attached Joint Statement of Purpose

EXHIBIT B – LETTER FROM RACHEL HOROWITZ, NEW JERSEY DEPUTY ATTORNEY GENERAL, TO MATTHEW BOYER, SPECIAL COUNSEL FOR DELAWARE, DATED OCTOBER 21, 2005

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

STATE OF NEW JERSEY
Office of the Attorney General
Department of Law and Public Safety
Division of Law
P.O. Box 112
Trenton, NJ 08625-0112

October 21, 2005

By Overnight Mail for
Saturday Delivery

Matthew Boyer, Esquire
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange St.
P.O. Box 2207
Wilmington, Delaware 19801

Re: State of New Jersey v. State of Delaware

Dear Mr. Boyer:

During the course of our investigation, New Jersey located the Record and Transcript of New Jersey v. Delaware I and is enclosing a CD containing the three (3) volumes and Record of same. This will now satisfy the subsequent verbal request made by Mr. Newell for the Record of Transcript during the document production of Oct. 5-6, 2005, and per Ryan's instructions of October 21, 2005, mode of delivery.

Also enclosed are pictures of the boxes that were reviewed by Mr. Newell during the October 5-6, 2005 document production.

Sincerely yours,

PETER C. HARVEY
ATTORNEY GENERAL OF
NEW JERSEY

By: s/ Rachel Horowitz
Rachel Horowitz
Deputy Attorney General

c: Ryan Newell, Esq.
Enclosures: CD contents:
New Jersey v. Delaware Vol I, II, III, and Record.
Photographs

No. 11, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX IN SUPPORT OF MOTION TO REOPEN AND FOR A SUPPLEMENTAL DECREE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

Brief

SUMMARY OF ARGUMENT 1

I. THE CONTROVERSY IS JUSTICIABLE AND WARRANTS REVIEW 3

A. New Jersey Properly Invoked This Court's Jurisdiction Under the 1935 Decree 3

B. The Case Presents a Serious, Ripe and Justiciable Controversy, as to Which New Jersey is the Real Party in Interest 4

C. No Alternative Forum Exists 9

II. ARTICLE VII GRANTS EXCLUSIVE STATE RIPARIAN JURISDICTION TO NEW JERSEY ON ITS OWN SIDE OF THE RIVER 11

A. The 1905 Compact Unambiguously Confers Exclusive Jurisdiction on New Jersey to Regulate Riparian Improvements Appurtenant to the New Jersey Shore of the River 11

B. Delaware is Not Entitled to Any Presumption Against the Relinquishment of Sovereignty Because the Boundary Was Contested When the States Entered Into the 1905 Compact 16

C. Delaware Has Identified No Extrinsic Evidence Warranting Any Other Conclusion 19

1. Extrinsic Evidence is Irrelevant Because the 1905 Compact is Unambiguous 19

2. Even If It Were Relevant, the Extrinsic Evidence Overwhelmingly Supports New Jersey 20

(a) The New Jersey Commissioners Believed That Article VII Gave New Jersey Exclusive Riparian Jurisdiction 20

(b) Delaware Conceded New Jersey's Authority in Original, No. 11 21

(c) Delaware Did Not Attempt to Regulate Riparian Rights on the New Jersey Side Until 1957, When It Promptly Acknowledged That It Had No Such Authority 23

(d) Delaware's Remaining Arguments are Insufficient as a Matter of Law 26

III. THE CASE SHOULD BE BRIEFED AND ARGUED THIS TERM 28

CONCLUSION 30

Supplemental Appendix

43. Letter of David Risilia, Office of Dredging and Sediment Technology, New Jersey Department of Environment, to David Blaha, Environmental Resources Management, dated October 19, 2005. . . . . 1a

44. Letter of David R. Keifer, Delaware Planning Office, to Richard Sullivan, Commissioner, New Jersey Department of Environmental Protection, dated February 17, 1972. . . . . .5a

45. Letter of David R. Keifer, Delaware Planning Office to Barry Hunsaker, Vice President, El Paso Eastern Company, dated March 17, 1972. . . . . .7a

46. 40 Delaware Laws chapter 179 (1935) 9a

47. Wilmington City Code, Sections 1-100 and 1-1 (Adopted June 17, 1993) 15a

48. Report of New Jersey Commissioners, dated March 16, 1903. . . . . 27a

TABLE OF AUTHORITIES

Cases

Abbott Labs., Inc. v. Gardner, 387 U.S. 136 (1967) 7

Arizona v. New Mexico, 425 U.S. 794 (1976) 10

Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) 16

California ex rel. State Lands Comm'r v. United States, 457 U.S. 273 (1982) 29

Colorado v. New Mexico, 459 U.S. 176 (1982) 5

Florida v. Mellon, 273 U.S. 12 (1927) 7

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 5

Illinois v. Kentucky, 500 U.S. 380 (1991) 24

Illinois v. Michigan, 409 U.S. 36 (1972) 10

Kansas v. Colorado, 206 U.S. 46 (1907) 5

Kansas v. Colorado, 533 U.S. 1 (2001) 5

Main Assocs. Inc. v. B&R Enters., Inc., 181 A.2d 541 (N.J. Super. Ct. Ch. Div. 1962) 25

Maryland v. Louisiana, 451 U.S. 725 (1981) 10

Massachusetts v. New York, 271 U.S. 65 (1926) 17

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) .. 16

Mississippi v. Louisiana, 506 U.S. 73 (1992) 4

Nebraska v. Wyoming, 507 U.S. 584 (1993) 4

New Hampshire v. Maine, 532 U.S. 742 (2001) 23, 29

New Jersey v. Delaware I, 205 U.S. 550 (1907) 14

New Jersey v. Delaware II (Decision),
291 U.S. 361 (1934) ..... *passim*

New Jersey v. Delaware II (Decree),
295 U.S. 694 (1935) ..... *passim*

New Jersey v. New York, 523 U.S. 767 (1998) 5, 19

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 19

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 7

Texas v. New Mexico, 462 U.S. 554 (1983) 10

United States v. Winstar Corp., 518 U.S. 839 (1996) 19

Virginia v. Maryland,
540 U.S. 56 (2003) ..... *passim*

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) .. 5, 10

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 10

Statutes, Session Laws, and Codes

32 Stat. 481, ch. 1302 (June 28, 1902) 12

40 Del. Laws ch. 179 (1935) 25

Compact of 1905 (Pl. App. 1a) ..... *passim*

Del. Code Ann. tit. 7, § 7002(f) (2005) 4, 6

Del. Code Ann. tit. 7, § 7003 (2005) 4, 6

N.J. Stat. Ann. § 12:3-21 (1891) 27, 28

N.J. Stat. Ann. § 12:3-22 (1891) 27

Code of City of Wilmington, Part I, Subpart A, § 1-100 .. 25

Code of City of Wilmington, Part I, Subpart B, § 1-1 25

Other Authorities

N.J. Op. Atty. Gen. 6 (1954) 26

3 Charles M. Andrews, *The Colonial Period of American History* 295 (1937, 9th printing 1967) 18

SUMMARY OF ARGUMENT

New Jersey's petition falls squarely within this Court's retained jurisdiction under the 1935 decree. That decree explicitly states that it is "without prejudice" to New Jersey's rights under the 1905 Compact. Nevertheless, Delaware now argues that the Court's boundary award in the 1935 decree effectively "altered" or "reduced" New Jersey's rights under Article VII of the 1905 Compact. A supplemental decree is necessary to "carry into effect" paragraph 7 of the decree, and thereby to confirm that the 1935 decree did not alter New Jersey's pre-existing, exclusive State riparian jurisdiction protected by Article VII.

The exercise of original jurisdiction would also be warranted here even if the Court's traditional test were applied. Delaware has caused serious injury to the rights of New Jersey by claiming authority to require permits for riparian improvements on the New Jersey side of the Delaware River. Delaware is asserting this authority on a current and ongoing basis and has withheld at least one permit. Regardless of whether Delaware's assertion of permitting authority takes the form of an approval or denial of any particular permit, its actions violate Article VII of the Compact, which reserved to New Jersey exclusive State riparian jurisdiction on its side of the river. In the case of Crown Landing, Delaware's action has also blocked New Jersey's completion of its own permit review, because Delaware will not allow the collection of subaqueous sediment samples needed by New Jersey's regulators to evaluate further the environmental impacts of the project. Delaware's interference with New Jersey's exclusive State

riparian jurisdiction is active and continuing, not speculative or remote. The controversy is therefore ripe.

Because New Jersey seeks to enforce its own rights under the 1905 Compact, it is the proper plaintiff and the real party in interest. There is no proper alternative forum where this issue could be raised or New Jersey's interests protected.

Delaware's argument on the merits is incorrectly premised on the presumption that it could not have surrendered its riparian jurisdiction to New Jersey in Article VII of the 1905 Compact unless it did so in unmistakable terms. This argument must fail as a matter of law for the same reason the Court rejected it in *Virginia v. Maryland*, 540 U.S. 56, 67-69 (2003). At the time the 1905 Compact was signed, the boundary was actively disputed; New Jersey, not Delaware, was exercising riparian jurisdiction on the New Jersey side of the River; and neither State would have assumed that Delaware enjoyed well-settled jurisdiction to the New Jersey shoreline -- a precondition for the application of the "unmistakability doctrine."

Whether considered by itself or in the context of the other articles, Article VII unambiguously gave New Jersey exclusive State riparian jurisdiction on its side of the River. It is a jurisdiction "on its own side . . . of every kind and nature," which precludes the possibility of concurrent jurisdiction.

Because the Compact is unambiguous, extrinsic evidence is not relevant. But that evidence, if considered, overwhelmingly supports New Jersey's position. The New Jersey drafters of Article VII explained that "every interest of the State of New Jersey has been protected, all its

riparian . . . rights . . . thoroughly safeguarded and every practical difficulty between the two States settled for all time." Delaware conceded New Jersey's exclusive riparian jurisdiction when this case was last here. And New Jersey has consistently exercised riparian jurisdiction on its own side of the River, both before and after the 1905 Compact, in clear contrast to Delaware's relatively recent and sporadic attempts to assert such riparian authority.

The Court should not appoint a special master. The Compact is unambiguous and clear on its face, and the "essential facts" are not disputed by either side. Under the circumstances of this case, the Court should simply set a briefing schedule and hear and decide whether Article VII of the 1905 Compact grants exclusive State riparian jurisdiction to New Jersey on its side of the River.

I. THE CONTROVERSY IS JUSTICIABLE AND WARRANTS REVIEW.

Whether considered under the Court's retained jurisdiction in the 1935 decree, or as a new original action by New Jersey, jurisdiction is warranted here.

A. New Jersey Properly Invoked This Court's Jurisdiction Under the 1935 Decree.

Notwithstanding its assertion to the contrary, Delaware takes the position that this Court's 1935 Decree effectively "altered" or "reduced" New Jersey's rights under the 1905 Compact, "insofar as this Court's clarification of the proper boundary between the two States *necessarily affected the States' rights as addressed in the 1905 Compact.*" (Del. Br. 25 n.13 (emphasis added).). Delaware's

stated position directly conflicts with paragraph 7 of the decree, which said the "decree is made *without prejudice*" to New Jersey's rights under the Compact of 1905. (N.J. App. 16a (emphasis added).) New Jersey seeks to enforce paragraph 7 of the decree and thereby establish that the decree did not, as Delaware claims, diminish its rights under the Compact. New Jersey has properly brought this motion pursuant to the retained jurisdiction provision of paragraph 5, which allows the Court to issue a supplemental decree to "carry into effect any of the provisions" of the decree. (*Id.* 15a.)

B. The Case Presents a Serious, Ripe and Justiciable Controversy in Which New Jersey is the Real Party in Interest.

New Jersey's petition for a supplemental decree pursuant to this Court's "retained jurisdiction" may not require the same showing that otherwise would be needed to invoke the Supreme Court's original jurisdiction in a new proceeding. *Cf. Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993). Nevertheless, the injury sustained by New Jersey here is of ample seriousness and magnitude to warrant an exercise of original jurisdiction, even under the standard ordinarily applied to original actions. *See Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). By requiring permits from New Jersey landowners, and by forbidding an entire category of riparian improvements on the New Jersey side of the river, Del. Code Ann. tit. 7, §§ 7002(f), 7003, Delaware has caused direct and significant injury to New Jersey's exclusive State riparian jurisdiction guaranteed by the 1905 Compact.

An interstate compact "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (*quoting Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938)). This Court has exercised its original jurisdiction to resolve conflicts between States concerning their respective authority under an interstate compact, both when the States disputed their boundary line, *New Jersey v. New York*, 523 U.S. 767, 771 (1998), and when, as in this case, the States disputed whether a compact gave one State exclusive riparian jurisdiction over projects extending across an undisputed boundary line. *Virginia v. Maryland*, 540 U.S. 56, 60 (2003).

New Jersey is the real party in interest in this dispute. Delaware has interfered with New Jersey's exclusive riparian jurisdiction in violation of New Jersey's rights under Article VII of the 1905 Compact; and New Jersey has a justiciable interest in protecting its ability to regulate development along its own shoreline for the general benefit and welfare of its citizens. The State is the proper plaintiff in this case. This Court found that the State, not Kansas farmers, was the real party in interest when Kansas sought damages based on crop losses attributable to Colorado's breach of the Arkansas River Compact. *Kansas v. Colorado*, 533 U.S. 1, 8-9 (2001). Colorado was likewise the proper plaintiff when it sought to protect diversions of the Vermejo River for the benefit of a Colorado corporation and future Colorado users. *Colorado v. New Mexico*, 459 U.S. 176, 182 & n.9 (1982). Such a controversy necessarily rises "above a mere question of local private right and involves a matter of state interest . . . ." *Id.* at 182 n.9 (quoting *Kansas v. Colorado*, 206 U.S. 46, 99 (1907)).

Delaware's assertion of jurisdiction presents serious and immediate consequences for the State of New Jersey. The area in question encompasses approximately twenty-nine miles of New Jersey waterfront, within which Delaware purports to forbid an entire class of riparian uses. Delaware's Coastal Zone Management Act, which it applies here, prohibits not only liquefied natural gas transfer facilities, but all bulk product transfer facilities and new heavy industry uses. Del. Code Ann. tit. 7, §§ 7002(f), 7003. Delaware would thus disallow New Jersey's authority to make its own independent determination as to the benefits of riparian uses forbidden by Delaware.[1] Moreover, Delaware seeks not only to regulate the nature of the riparian improvements appurtenant to New Jersey's waterfront, but to dictate and limit the uses to which the uplands in New Jersey may be put. (*See, e.g.*, N.J. App. 139a (refusing to allow "on-shore storage tanks essential to the operation" of the pier).)

---

[1] Delaware's policy of prohibiting any proposed development it deems inappropriate for this area of New Jersey, without providing New Jersey an opportunity to review such proposals, may date to 1972. At that time, El Paso Eastern proposed construction of an LNG facility in New Jersey with a pier extending into the Delaware River within the Twelve-Mile Circle. (N.J. Supp. App. 7a-8a.) El Paso abandoned its proposal in February 1972, shortly before Delaware informed the company that the pier "would be a prohibited off-shore bulk product transfer facility." (*Id.*) El Paso never even approached New Jersey about the project. However, in response to an inquiry from his Delaware counterpart, New Jersey's Commissioner of Environmental Protection stated on March 2, 1972 that New Jersey would review the "entire project" if and when it was submitted, but that "El Paso has not made any application to this Department and we have no specific knowledge of their proposal." (Del. App. 13a.)

Delaware's suggestion that New Jersey is not injured because it could allow this category of facilities outside the Twelve-Mile Circle merely underscores the breadth of Delaware's claim and the immediacy and seriousness of the harm it poses to New Jersey. That argument recognizes that Delaware currently precludes New Jersey from using the affected area of its waterfront in ways that Delaware prohibits. Thus, the immediate impact of Delaware's actions, as characterized by Delaware itself, is to deprive New Jersey of its exclusive jurisdiction over riparian improvements for the benefit of its own citizens, and to limit development along a significant portion of New Jersey's shoreline based on interests and concerns determined solely by Delaware.

Because Delaware asserts its jurisdiction over existing projects, this controversy is ripe for review. "[T]he question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 149 (1967)). The dispute here is not hypothetical or conjectural, nor is the injury which it causes speculative or remote. *See Florida v. Mellon*, 273 U.S. 12, 18 (1927).

It is immaterial to the question of ripeness whether Delaware has *withheld* a permit, as it did this year from Crown Landing (N.J. App. 137a-142a), or has *required* a permit, as it did this year over the objection of Fenwick Commons, (*id.* 94a-95a, 131a-132a), and as it has done since 1971 over the objection of DuPont (*id.* 89a-92a, 111a-130a). Whether Delaware grants or withholds a permit, it is

violating New Jersey's exclusive right under Article VII "to exercise riparian jurisdiction of every kind and nature" on its "own side of the river." (*Id.* 5a.) In *Virginia v. Maryland*, 540 U.S. 56 (2003), the Court recognized that a State's mere exercise of regulatory jurisdiction may constitute an injury to another state's sovereign interests that is ripe for adjudication, regardless of whether there has been final action denying a permit. In that case, the Court granted Virginia's motion for leave to file a bill of complaint to invalidate Maryland's permit authority, despite the fact that Virginia's application for a permit was still awaiting final action by Maryland. *Id.* at 64. The Court subsequently ruled on Virginia's claims despite the fact that Maryland had issued a conditional permit in 2001, before the case was argued. *Id.*

Delaware's assertion of jurisdiction burdens development even where Delaware ultimately issues a permit. Landowners like Fenwick Commons have reluctantly acquiesced and obtained such permits as a cost of doing business. (N.J. App. 94a- 95a.) In the case of the Crown Landing project, Delaware's refusal to issue a permit has frustrated New Jersey's own regulatory review of the project by prohibiting Crown Landing from taking sediment samples from the riverbed, which the New Jersey Department of Environmental Protection, Office of Dredging and Sediment Technology (ODST), has determined is necessary to evaluate the environmental impacts from the dredging needed to construct the pier.[2] (N.J. App. 138a; N.J. Supp. App. 1a-4a.)

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[2] Contrary to Delaware's suggestion that New Jersey's ODST conceded Delaware's authority over the pier in February 2005 (Del. Br.

Delaware has thus blocked New Jersey from completing its own review of the Crown Landing project. (*Id.*)[3] New Jersey is entitled to evaluate the project on its merits, free from interference by Delaware.

Because Delaware has banned entire categories of development along twenty-nine miles of New Jersey's shoreline, the injury to New Jersey is not remote or speculative. New Jersey has a compelling interest in confirming its exclusive State riparian jurisdiction along its own shoreline so that Delaware cannot continue to infringe upon New Jersey's riparian jurisdiction under the 1905 Compact.

C. No Alternative Forum Exists.

Delaware argues that this Court should decline jurisdiction because an alternative forum might have existed where the Compact issue could have been litigated -- if Crown Landing had simply appealed the permit denial through the Delaware state court system, with possible review by certiorari in this Court of any adverse decision by the Supreme Court of Delaware. (Del. Br. 32-35.) It is

---

65), ODST made clear on May 24, 2005 that "although a portion of the pier is proposed to be in Delaware, construction of the entire pier, and any associated dredging, is subject to New Jersey's exclusive review and permitting authority, and not that of Delaware." (N.J. App. 153a.)

[3] As Delaware itself points out, the issuance of federal permits will also be conditioned on the issuance of state permits. (Del. Br. 13; see also N.J. App. 136a-137a, 142a.).

undisputed, however, that New Jersey was not a party to Crown Landing's permit proceeding and Crown Landing did not litigate the Compact question. (N.J. App. 142a.) Moreover, requiring New Jersey to litigate its Compact rights in a Delaware state permit proceeding would defeat the purpose of Article VII -- which denies Delaware the authority to regulate New Jersey's riparian rights -- allowing Delaware to "unilaterally nullif[y]" the Compact. *West Virginia ex rel. Dyer v. Sims*, *supra*, 341 U.S. at 28.

Wyoming v. Oklahoma, 502 U.S. 437 (1992), is directly on point. The Court rejected the hypothetical-alternative-forum argument both because there was no "pending" forum, and because a private party's representation of the State's sovereign interest in such a hypothetical forum would be inadequate. *Id.* at 451-52. That rationale applies equally to this case.[4] Further, the concern of the dissenting justices – that Wyoming's challenge to the Oklahoma statute could have been brought by the affected mining companies "in another, more convenient, forum," *id.* at 476 – does not apply here as New Jersey asserts a violation of its own Compact rights. *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

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[4] The two principal cases relied on by Delaware are inapposite. Unlike this case, *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), involved a "pending state-court action" to which the Court could defer. *Id.* at 797. Moreover, "Arizona's interests were . . . actually being represented by one of the named parties to the suit." *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). *Illinois v. Michigan*, 409 U.S. 36 (1972), is likewise distinguishable. The Court there declined original jurisdiction because "Illinois was a party to the case decided by the Supreme Court of Michigan," and should have petitioned for certiorari. *Id.* at 36-37.

II. ARTICLE VII GRANTS EXCLUSIVE STATE RIPARIAN JURISDICTION TO NEW JERSEY ON ITS OWN SIDE OF THE RIVER.

A. The 1905 Compact Unambiguously Confers Exclusive Jurisdiction on New Jersey to Regulate Riparian Improvements Appurtenant to the New Jersey Shore of the River.

Delaware's interpretation of the 1905 Compact is wholly at odds with its plain language. Nothing in Article VII remotely suggests that Delaware could have any jurisdiction over riparian improvements on New Jersey's shoreline, any more than New Jersey could exercise riparian jurisdiction on the Delaware side. To the contrary, Article VII plainly provides, in symmetrical terms, that "[e]ach State may, on *its own side of the river*, *continue* to exercise riparian jurisdiction *of every kind and nature . . . under the laws of the respective States*." (N.J. App. 5a (emphasis added).) As New Jersey explained in its opening brief, the plain language of this Article confirmed that New Jersey would continue to exercise riparian jurisdiction over riparian improvements such as docks, wharves, and piers in the same manner to which it had been historically accustomed, free of regulation or interference by Delaware. (N.J. Br. 24-27.)

Delaware responds with an interpretation of the 1905 Compact that is contrary to its plain language, particularly when viewed in the context of the contemporaneous understanding and practice of the parties. For example, Delaware argues that much of the plain language of Article VII was intentionally ambiguous or must be ignored because the Compact was "drafted against the backdrop of an ongoing boundary dispute," so that this Court's 1934

boundary decision subsequently altered the plain meaning of the Compact. (Del Br. 45-50.) Yet this argument ignores the plain language of Article IX of the Compact, which provided that it would be "binding in perpetuity upon both of said States" (N.J. App. 6a), as well as the plain language of this Court's 1935 decree, which was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . ." (*Id.* 16a.)

Delaware also concedes that Article VII's use of the word "continue" is significant but then construes this term to limit the scope of New Jersey's riparian jurisdiction protected by the Compact. (Del. Br. 47-56.) This construction both conflicts with the plain language of Article VII, which broadly defined the riparian jurisdiction in question as being "of every kind and nature," (N.J. App. 5a), and ignores New Jersey's history of regulating riparian improvements on its own side of the River before and after the 1905 Compact (*see* N.J. Br. 8-10).[5] Delaware's construction also ignores

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[5] Delaware also argues that New Jersey's right to exercise riparian jurisdiction is somehow limited by the scope of improvements existing at the time of the Compact and could not possibly apply to construction of a 2,000-foot pier today. (Del. Br. 42-45, 53.) This argument again ignores that Article VII explicitly applies to riparian jurisdiction of "every kind and nature." (N.J. App. 5a.) It also ignores the scope of the improvements existing at the time of the Compact, as well as projects that clearly could have been contemplated at that time. For example, by 1905 New Jersey had issued riparian grants for one pier extending 850 feet offshore and several piers extending 400 to 500 feet offshore. (N.J. App. 32a-35a). Further, in 1905, the country was well familiar with large scale marine improvements. For example, the Panama Canal was authorized by Congress in 1902. 32 Stat. 481, ch. 1302 (June 28, 1902).

the fact that Delaware conceded New Jersey's exclusive riparian jurisdiction in this area as recently as 1958 (N.J. App. 87a-89a, 102a-110a), and that Delaware did not first attempt to regulate improvements on New Jersey's side of the River until 1971, sixty-six years after it ratified the Compact. (Del. Br. 62.)[6]

Delaware attempts to avoid the plain language of Article VII by pointing to other Articles of the 1905 Compact. For example, Delaware notes that Article IV used the word "exclusive" in referring to criminal jurisdiction over fishing violations, while that word was not used in Article VII. (Del. Br. 52.) Delaware concludes that the drafters must not have intended the riparian jurisdiction mentioned in Article VII to be "exclusive" since they knew how to use that word if they wanted to do so. (*Id.*) But the drafters also did not use the word "concurrent" to describe the riparian jurisdiction discussed in Article VII, even though that word is used four times in Article IV to describe the concurrent fishing legislation to be enacted by the States.

Article IV called for the enactment of "uniform" fishing laws immediately following ratification of the Compact, after which time such laws could be repealed or modified only by "concurrent legislation" by the States. But

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[6] Delaware's statement that it approved leases in 1962 and 1963 for two pipelines that traversed the River between New Jersey and Delaware, (Del. Br. 62), is of no relevance. A pipeline or cable that crosses from one side of the River to the other is not a riparian improvement, and, like a bridge, obviously cannot be constructed without permission from both States. Those examples have no bearing on the authority over riparian improvements appurtenant to the New Jersey shoreline.

Article IV needed to go further, particularly since *New Jersey v. Delaware I* arose out of Delaware's effort in 1877 (promptly enjoined by this Court) to arrest and prosecute New Jersey citizens. (N.J. Br. 5-6.) The drafters sought to prevent a recurrence of that controversy by providing that "Each state shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its *own* inhabitants for violation of the concurrent legislation relating to fishery herein provided for." (N.J. App. 5a (emphasis added).)

Article VII addressed the entirely different and, at the time, completely uncontroversial proposition that each State would "on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature." This language plainly meant exclusive jurisdiction; it could not be concurrent if each State had riparian jurisdiction "of every kind and nature" on "its own side" of the River.[7]

Virginia v. Maryland is again instructive. Virginia's riparian jurisdiction under Article VII of the 1785 Compact was held to be exclusive of Maryland's even though Article VII did not mention jurisdiction or use the word "exclusive." 540 U.S. at 67. Examining the other articles of the 1785

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[7] Delaware also relies in Article VIII of the Compact (Del. Br. 52), which provides that "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, *except as herein expressly set forth.*" (N.J. App. 5a (emphasis added).) As this Court previously ruled, Article VIII reflected that fact that the 1905 Compact did not settle the boundary line. *See New Jersey v. Delaware*, 291 U.S. at 378. While acknowledging this continuing dispute, the States nevertheless expressly allocated riparian jurisdiction along the River in Article VII of the Compact.

Compact, this Court concluded that "the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." *Id.* And examining Article VII of the 1785 Compact, this Court concluded that "[i]f any inference at all is to be drawn from Article Seventh's silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." *Id.* The same is true here. In Article VII of the 1905 Compact, it was unnecessary for the drafters to use the word "exclusive" to describe the regulation of each State's riparian rights because both States would have assumed that each would continue to regulate riparian rights on its own side.

Delaware's efforts to distinguish *Virginia v. Maryland* are unpersuasive. First, Delaware incorrectly asserts that this Court predicated Virginia's exclusive riparian jurisdiction on the "principle of equitable apportionment" (Del. Br. 73), when, in fact, this Court's decision was based on the "plain language" of the 1785 Compact. 540 U.S. at 66. Nor can Delaware distinguish the case by postulating that it "could have" been decided instead on a "Commerce Clause" theory (Del. Br. 74), when it was actually decided as a compact case. Delaware lastly tries to distinguish it as a case about mere water use, rather than about the construction of "enormous structures on the submerged lands of the river" (Del. Br. 75), ignoring that the dispute focused on the construction of a substantial water intake pipe, 10 feet in diameter, extending 725 feet into the Maryland riverbed, and capable of withdrawing more than

200 million gallons of water per day.[8] The 1785 Compact gave Virginia the right to authorize that enormous project, "free of regulation by Maryland." *Virginia v. Maryland*, 540 U.S. at 79.

B. Delaware is Not Entitled to Any Presumption Against the Relinquishment of Sovereignty Because the Boundary Was Contested When the States Entered Into the 1905 Compact.

Delaware's central argument on the merits is that it has been the true owner of the subaqueous land within the Twelve-Mile Circle up to the low-water mark on the New Jersey side since 1682, and that prior to the 1905 Compact, Delaware "[u]nquestionably" had the authority to regulate improvements extending beyond the New Jersey shoreline. (Del. Br. 36-49, 53-60.) Delaware claims to have retained the authority to regulate projects extending into its territory unless the Compact of 1905 provided otherwise in "unmistakable terms." (*Id.* 46).[9]

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[8] *See* Lodging Accompanying Reply by the Commonwealth of Virginia to the State of Maryland's Exceptions to the Report of the Special Master at L-336, *Virginia v. Maryland*, No. 129, Orig. (Mar. 31, 2003).

[9] Delaware appears to be arguing what is referred to as the "unmistakability doctrine," which holds: "'Sovereign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'" *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

The unmistakability doctrine does not apply here because the boundary between the States was disputed at the time of the Compact. In *Virginia v. Maryland*, Maryland also relied on the unmistakability doctrine, but this Court, in an opinion by Chief Justice Rehnquist, flatly rejected it:

> Maryland . . . argues that we must read Article Seventh's regulatory silence in her favor because her sovereignty over the River was "well-settled" by the time the 1785 Compact was drafted. *Maryland is doubtless correct that if her sovereignty over the River was well settled as of 1785, we would apply a strong presumption against reading the Compact as stripping her authority to regulate activities on the River. See, e.g., Massachusetts v. New York*, 271 U.S. 65, 89 (1926) ("[D]ominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged"). *But we reject Maryland's historical premise.*
>
> . . . Our own cases recognize that the scope of Maryland's sovereignty over the River was in dispute both before and after the 1785 Compact. . . .
>
> The mere existence of the 1785 Compact further belies Maryland's argument. After all, the 1785 Compact

> sought "to regulate and settle the jurisdiction and navigation" of the River. This endeavor would hardly have been required if, as Maryland claims, her well-settled sovereignty gave her exclusive authority to regulate all activity on the River.

540 U.S. at 67-69 (citations and footnote omitted, emphasis added).

Just as the Maryland-Virginia boundary was disputed at the time of the 1785 Compact, New Jersey and Delaware contested their boundary and jurisdiction when they signed the 1905 Compact.[10] The boundary remained in dispute until this Court's 1934 decision, at which time the Court observed "that almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them." 291 U.S. at 376.[11] As of 1905,

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[10] Similar to the 1785 Compact, the preliminary recital of the 1905 Compact refers to the "controversy [that] hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River" and noted "the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom . . . ." (*Compare* N.J. App. 1a, *with Virginia v. Maryland*, 540 U.S. at 68 (1785 Compact preamble).)

[11] Though ultimately unsuccessful, New Jersey's challenge to Penn's title was thoroughly defensible. In fact, America's leading scholar on colonial history wrote as late as 1937 that "Penn's sole title to the government and soil of the Delaware counties rested on two land leases of doubtful legality, because in 1682 the duke himself had no certain title to the region." 3 Charles M. Andrews, *The Colonial Period of American History* 295 (1937, 9th printing 1967).

therefore, neither New Jersey nor Delaware could have thought that Delaware had any "well-settled" jurisdiction extending to the New Jersey shoreline. The unmistakability doctrine has been described as "simply a rule of presumed (or implied-in-fact) intent." *United States v. Winstar Corp.*, 518 U.S. 839, 920 (1996) (Scalia, J., concurring). The presumption does not apply under the facts of this case. *See Virginia v Maryland*, 540 U.S. at 67-69.

C. Delaware Has Identified No Extrinsic Evidence Warranting Any Other Conclusion.

1. Extrinsic Evidence is Irrelevant Because the 1905 Compact is Unambiguous.

Delaware correctly states (Del. Br. 45-46) that legislative history and post-Compact extrinsic evidence, including the parties' subsequent course of performance, should be considered *only* if the Court believes that Article VII of the 1905 Compact is ambiguous. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); *see also New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) (Scalia, J., dissenting) ("It is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning."). Because the 1905 Compact unambiguously grants New Jersey exclusive riparian jurisdiction along its own shore, extrinsic evidence is of no consequence.

2. Even If It Were Relevant, the Extrinsic Evidence Overwhelmingly Supports New Jersey.

If such extrinsic evidence is considered, it overwhelmingly supports New Jersey. The States' contemporaneous construction of the 1905 Compact and their pattern of conduct under the Compact evidence a clear understanding that Delaware had no right to regulate the construction of riparian improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle.

(a) The New Jersey Commissioners Believed That Article VII Gave New Jersey Exclusive Riparian Jurisdiction.

When the New Jersey Commissioners who drafted the Compact submitted their report to the New Jersey legislature in 1903, they stated that "every interest of the State of New Jersey has been protected, all its *riparian* . . . rights . . . *thoroughly safeguarded* and every practical difficulty between the two States settled *for all time*." (N.J. Br. 7; N.J. Supp. App. 28a (emphasis added).) These statements reflect the plain language of Article VII of the Compact, which protected New Jersey's "riparian" rights, and of Article IX, which provided that, upon ratification, the Compact "shall be and become binding *in perpetuity*" upon both States. (N.J. App. 6a (emphasis added).) Thus, the plain language reflects a contemporaneous understanding that even if the boundary were finally determined in Delaware's favor, Delaware could not begin regulating riparian improvements appurtenant to New Jersey's shore.

(b) Delaware Conceded New Jersey's Authority in Original, No. 11.

Delaware tries to distance itself from the statements it made here in the 1930s when it repeatedly acknowledged that the 1905 Compact protected both the "right" of New Jersey riparian owners to wharf out to the navigable channel and the "right" of the State of New Jersey to regulate the exercise of those rights. (*See* N.J. Br. 27-30.) Delaware, in fact, is unable to point to *anything* in the record in Original, No. 11, that supports its current litigating position.

Delaware attempts to blunt its prior admissions by arguing that the "scope of riparian jurisdiction in Article VII" was not at issue in the 1934 case. That is incorrect. New Jersey expressly claimed that Article VII of the 1905 Compact effectively established the boundary in the middle of the River. (*E.g.*, N.J. App. 173a-174a.) Delaware responded, successfully, that Article VII did not alter the boundary, which was left open by Article VIII. (*Id.* 186a-187a.) It was in this context that Delaware urged in its Reply Brief: "[e]ven if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way." (N.J. App. 237a.)

Delaware points to the "even if" qualification from this statement and argues that it shows that "Delaware was arguing in the alternative." (Del. Br. 69). This qualification was made, however, to dispute New Jersey's further claim that the Compact gave it title to the middle of the River. (N.J. App. 235a-237a.) Delaware on two other occasions

made clear that New Jersey, not Delaware, had the authority to regulate riparian rights on the New Jersey side. (*See id.* 186a (stating that Article VII was "a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights"); 191a ("the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them").)

More importantly, when New Jersey argued that, if Delaware should prevail in its boundary argument, it could interfere with development along New Jersey's shoreline, Delaware expressly assured this Court that New Jersey's rights were protected by Article VII. (*Id.* 223a.) This Court effectively accepted that assurance when it established the boundary at the low-water mark on the New Jersey side, "subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385.

Moreover, in contrast to its current position, Delaware clearly recognized in *New Jersey v. Delaware II* that the exercise of riparian rights of property owners on the New Jersey side of the River did not depend on ownership of the subaqueous soil. Addressing this specific issue, Delaware stated to this Court:

> Plaintiff argues that the right of the citizens of New Jersey to wharf out is in some way inconsistent with or adverse to the ownership of the subaqueous soil of the Delaware River by William Penn. This contention is without merit.
>
> . . . .

> To put the matter another way, the right of the riparian owner to wharf out does not rest upon title to the subaqueous soil, and a claim to ownership of the subaqueous soil by the State of Delaware is not inconsistent with the use of such subaqueous soil by the riparian proprietor for the purpose of wharfing out. (N.J. App. 178a, 184a.)

As Delaware's own statements in *New Jersey v. Delaware II* make clear, Delaware's current litigating position is inconsistent with its earlier one. Its earlier argument about New Jersey's compact rights was intended to persuade the Master and this Court to adopt its position on the boundary. The Master and the Court did so, and New Jersey would be severely prejudiced were Delaware now permitted to disavow its earlier assurances. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (No. 130, Orig.) (applying judicial estoppel based on New Hampshire's position in the 1970s in No. 64, Orig.).

(c) Delaware Did Not Attempt to Regulate Riparian Rights on the New Jersey Side Until 1957, When It Promptly Acknowledged That It Had No Such Authority.

New Jersey has been regulating the construction of riparian improvements on its side of the River at least since 1854. (N.J. Br. 8.) By contrast, the first documented instance that Delaware considered regulating riparian improvements on the New Jersey side was in 1957, when the Delaware State Highway Department conferred with DuPont

about whether the 1905 Compact deprived Delaware of authority to regulate a water outflow pipe. (N.J. Br. 31-32; N.J. App. 87a-89a, 102a-110a.) On the advice of its counsel that the Compact denied Delaware such authority (*id.* at 106a-07a), the Highway Department adopted a resolution stating that it "has no jurisdiction over the area mentioned" (*id.* 110).

Delaware did not try again until 1971, when Delaware and DuPont entered into a subaqueous lands lease for DuPont's Chamber Works facility. (N.J. App. 90a-92a, 115a-130a.) The Lease deferred any payments owed to Delaware until such time as a federal court issued a "final judgment" resolving Delaware's disputed title. (N.J. App. 91a, 121a.) When Delaware's Deputy Attorney General demanded payment from DuPont in 1981, asserting that this Court's 1934 decision constituted that "final judgment" (*id* 126a-127a), DuPont successfully resisted, again on the basis of the 1905 Compact and the State Highway Department's acknowledgment in 1957 and 1958 that Delaware lacked such jurisdiction (*id.* 128a-130a).

Moreover, the States' respective positions on their authority to tax riparian improvements on the New Jersey side of the River confirm New Jersey's exclusive riparian jurisdiction on its side of the River.[12] New Jersey municipalities have repeatedly taxed riparian improvements on the New Jersey shoreline extending below the low-water mark in the Twelve-Mile Circle. (*See* N.J. Br. 31; N.J. App.

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[12] A State's exercise of its taxing power is "one of the primary indicia of sovereignty." *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991).

32a, 37a, 40a, 42a, 48a, 49a.) New Jersey's taxation power under the 1905 Compact was affirmed forty-three years ago in *Main Assoc's Inc. v. B&R Enters., Inc.*, 181 A.2d 541, 544 (N.J. Super. Ct. Ch. Div. 1962).

Delaware responds that it was not a party to *Main*, so that case "in no way bears on Delaware's course of performance under the Compact." (Del. Br. 66.) But Delaware fails to mention two key details. First, Delaware has not offered any evidence that it has ever taxed any riparian improvements extending into the River on the New Jersey side. Second, Delaware has expressly recognized for the past seventy years that the 1905 Compact casts doubt on its authority to levy such taxes. Following this Court's 1934 decision, Delaware enacted a law defining the boundary of the City of Wilmington as reaching the "low water mark upon the easterly side of the Delaware River." 40 Del. Laws ch. 179 (1935) (N.J. Supp. App. 13a.) But the Legislature specifically barred the City from taxing property on the New Jersey side of the River "until the final determination of the effect of an agreement or compact entered into in the year 1905 between the States of New Jersey and Delaware, known as the compact of 1905 . . . ." (N.J. Supp. App. 14a.) This limitation remains part of the charter of the City of Wilmington. *See* Code of City of Wilmington, Part I, Subpart B, § 1-1 (repeating language of 40 Del. Laws ch. 179) (N.J. Supp. App. 21a); *id.*, Subpart A, § 1-100 (defining the City as "now established in 40 Del. Laws chapter 179") (N.J. Supp. App. 15a.)

(d) Delaware's Remaining Arguments are Insufficient as a Matter of Law.

Delaware raises several other course-of-performance arguments based on New Jersey's actions or statements, none of which is persuasive. First, Delaware points to New Jersey's 1980 coastal zone management plan, which anticipated a joint effort by New Jersey and Delaware to "coordinate reviews of any proposed development that would span the interstate boundary . . . ." (N.J. App. 74a; Del. App. 83a.) Delaware fails to mention, however, that New Jersey's regulators abandoned that effort in 1994 based on their concerns "about giving a veto to Delaware as to projects that otherwise would have met New Jersey standards." (N.J. App. 76a.)

Next, Delaware notes a single instance in 1996 when the New Jersey DEP issued a waterfront development permit that required its own Division of Parks and Forestry to obtain Delaware's approval for structures that were part of a joint Delaware-New Jersey project to reestablish a historical ferry service crossing the River. (Del. Br. 62a; N.J. App. 71a, 93a-94a.) New Jersey's cooperative decision in that instance to seek Delaware's concurrence for a joint project hardly constitutes an intentional relinquishment of New Jersey's historic compact rights. *See Virginia v. Maryland*, 540 U.S. at 76-77.

Finally, Delaware misplaces its reliance on the 1954 Opinion of the New Jersey Attorney General. 1954 N.J. Op. Atty. Gen. 6. (Del. App. 69a.) Contrary to undermining New Jersey's position, that opinion reaffirmed that "the State of New Jersey has by virtue of Article VII the *complete and exclusive right* to make grants and leases of riparian lands

below low water mark on its side of the River." (*Id.* 70a (emphasis added).) The opinion also was consistent with New Jersey law allowing a grantee or lessee to dredge to the main channel. N.J. Stat. Ann. § 12:3-21 (enacted in 1891).

Delaware emphasizes the last portion of the opinion, where the Attorney General concluded that, under N.J. Stat. Ann. § 12:3-22, New Jersey could not issue a license or fix charges for dredging within the Twelve-Mile Circle where the submerged lands were not "'lands of the state' under tide waters." (*Id.* 72a-73a.) But Delaware is confusing § 12:3-22 (at issue in the 1954 opinion) with § 12:3-21, the provision allowing riparian owners to dredge out to the main channel. Section 12:3-22 is not limited to riparian owners, but generally addresses dredging activities such as mining. At the same time, section 12:3-21 makes clear that a riparian owner under a grant from New Jersey retains the right to dredge to the main channel:

> No person . . . shall dig, dredge or remove any deposits of sand or other material from the lands of the State lying under tidal waters without a license so to do first obtained as provided in section 12:3-22 of this Title . . . . ; *provided, however, that nothing in this section contained shall prevent the owner of any grant or lease from the State . . . from digging, dredging, removing, and taking sand and other material within the lines of, or in front of, such grant or lease, for the purpose of improving lands granted or leased to them . . . by the State, nor prevent such owner . . . from digging or dredging a*

> *channel or channels to the main channels, and removing and taking the material therefrom.*

N.J. Stat. Ann. § 12:3-21 (enacted 1891) (emphasis added). Contrary to Delaware's suggestion, New Jersey law since 1891 has permitted dredging necessary to reach the main channel, including within the Twelve-Mile Circle. (*See, e.g.*, N.J. App. 28a (Castagna Affidavit), 70a (1982 permit authorized dredging 200 feet beyond the mean-low water mark).)

III. THE CASE SHOULD BE BRIEFED AND ARGUED THIS TERM.

Delaware has not offered any legitimate reason to appoint a special master. Delaware says it expects to offer historical evidence about each State's riparian rights within the Twelve-Mile Circle under common law and applicable state statutes -- as well as evidence of the historical exercise of those rights -- prior to the 1905 Compact." (Del. Br. 76.) But Special Master Rawls already compiled the evidence of the riparian grants and improvements on the New Jersey side prior to 1931.[13] Delaware also says that it would put forward evidence of "each States' intent at the time it signed the Compact." (Del. Br. 76.) But that evidence too was compiled by Special Master Rawls. (Record, No. 11, Orig., Pl. Ex. 161 at 25-45, Ex. 162 at 13-20.)

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[13] For a chronological listing of the various riparian grants, with cross-references to the record compiled by Special Master Rawls, *see* N.J. App. 30a-47a (Affidavit of Richard G. Castagna).

Lastly, Delaware says it would offer "course-of-performance evidence from the 100 years that have passed since the signing of the Compact." (Del. Br. 75). But Special Master Rawls already heard evidence concerning the parties' "course-of-performance" prior to 1933. And the course-of-performance evidence set out by New Jersey and Delaware in this round of briefing -- which Delaware concedes is irrelevant to interpreting an *unambiguous* Compact -- demonstrates that there is nothing of consequence in Delaware's favor that could materially change the conclusion that Article VII of the 1905 Compact granted New Jersey exclusive riparian jurisdiction on its own side of the River.

While it is true that this Court frequently appoints a special master in original action proceedings, it has declined to do so when the "essential facts" were not in dispute, *California ex rel. State Lands Comm'r v. United States*, 457 U.S. 273, 278 (1982), or when the Court could decide the case as a matter of law, *New Hampshire v. Maine*, 532 U.S. at 756. Both of those considerations apply here. Delaware has not identified any material facts upon which the States disagree -- Delaware and New Jersey simply disagree about the legal conclusions to be drawn from those facts. Under the unique circumstances of this case -- where the question is one of Compact construction, an extensive record compiled by a special master already exists, and the Court has recently issued an opinion addressing the key legal issues -- there is no need to appoint another special master.

CONCLUSION

The Court should grant New Jersey's motion to reopen and set a briefing schedule allowing this case to be argued and decided this term.

Respectfully submitted,

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November 8, 2005

APPENDIX 43 – LETTER OF DAVID RISILIA, NEW JERSEY OFFICE OF DREDGING AND SEDIMENT TECHNOLOGY, TO DAVID BLAHA, DATED OCTOBER 19, 2005.

STATE OF NEW JERSEY
Department of Environmental Protection
Site Remediation Program
Office of Dredging and Sediment Technology
P.O. Box 028
Trenton, New Jersey 08625
(609) 292-1250
FAX (609) 777-1914

RICHARD J. CODEY
Acting Governor

BRADLEY M. CAMPBELL
Commissioner

October 19, 2005

Mr. David Blaha
Environmental Resources Management
200 Harry S. Truman Parkway Suite 400
Annapolis, MD 21401

RE: Sediment Sampling Concurrence for BP/Crown Landing LNG Import Terminal Waterfront Development Permit Application
File No. 0809-02-0011.1 WFD 050001
Location: Logan Township, Gloucester County

Dear Mr. Blaha:

The Office of Dredging and Sediment Technology (ODST) is responding to recent inquires made by you and the other

BP representatives, who have sought guidance on the Department's dredge material characterization requirements as they apply to the subject Waterfront Development Permit application.

Approximately 800,000 yd^3 of material is proposed to be hydraulically and mechanically dredged to a project depth of -40' MLW plus -2' overdredge within the currently proposed LNG ship berth located in the Delaware River. The proposed disposal site has been identified as the Weeks/White's Rehandling Basin located in Logan Township, Gloucester County, New Jersey.

On December 28, 2004, via e-mail, the OTST conditionally accepted an electronically submitted revised sediment core location proposal submitted by Weston Solutions. Subsequently, Weston Solutions submitted a Revised Sediment Sampling and Analysis Plan (SAP) dated January 2005.

The subject SAP proposes to collect twelve sediment cores at the locations noted on the plan entitled "SAMPLE LOCATIONS PLAN, BP, BATHYMETRY MAP CROWN LANDING, LLC LOGAN TOWNSHIP GLOUCESTER COUNTY, NEW JERSEY" prepared by Weston Solutions, dated August 20, 2004 and last revised December 9, 2004. Subsequent to sample collection, each sample will be separated into four zones relative to specified depths (as depicted on table 5 of the referenced report) and separated into aliquots. This will yield a total of 38 samples. Each of these aliquots will be discretely analyzed following approved methods for the requisite physical and chemical parameters.

The ODST has reviewed the materials submitted and determined that the proposed SAP is consistent with the protocol found in the Department's Technical Manual entitled *"The Management and Regulation of Dredging Activities and Dredged Material in New Jersey's Tidal Waters"* (Dredging Manual), dated October 1997. The proposed SAP must be conducted to enable the Department to review this project.

The Department requires sediment characterization of all materials to be dredged in accordance with the Rules on Coastal Zone Management specifically, N.J.A.C. 7:7E-7.12 – Dredged Material Placement On Land. This rule requires that: *Dredged material placement on land is conditionally acceptable provided that the use is protective of human health, groundwater quality, and surface water quality, and manages ecological risks.*

Given the significant quantity of material proposed to be dredged as part of this project, adequate characterization is an essential component of the application review process. The application was found deficient on February 4, 2005, and again on July 15, 2005, because in part, the requisite sediment data had not been received from the applicant. Accordingly, you have been previously advised that this application will not be deemed complete for review and for a public hearing until the Department receives a complete data package in accordance with the SAP.

Should you have any questions concerning this letter or the information required by the Dredging Manual, you may contact me at (609) 292-9342.

Sincerely,

/S/
David Q. Risilia
Project Manager, Office of Dredging
and Sediment Technology

c: Cecelia Oswald, Weston
Laurie Beppler, BP
Rachel Horowitz, DAG

APPENDIX 44 - LETTER OF DAVID R. KEIFER, DELAWARE PLANNING OFFICE, TO HON. RICHARD SULLIVAN, COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DATED FEBRUARY 17, 1972.

February 17, 1972

Hon. Richard Sullivan
Commissioner
Dept. of Environmental Protection
P.O. Box 1390
Trenton, N. J. 08625

Dear Mr. Sullivan:

RE: El Paso Eastern Company

Please find a letter that we received from the subject firm for a status decision under our Coastal Zone Act. Before I render a decision telling them whether they are prohibited or need a permit or do not fall within the scope of the Act, I would like to have your reaction to their proposal. In general terms, do you control projects of this type under New Jersey law at this time. If so, have you approved the project or will you?

I would like to receive New Jersey's views on the project since a part of the project would be located in New Jersey but the pier which is necessary for the project to be undertaken is located in Delaware. In addition to getting your reaction to the subject project, I think it would be helpful if we could establish a system of communications for other projects of this type that will undoubtedly develop.

Appendix 44

If you have any questions or would like to discuss the project, please call me.

Sincerely,

David R. Keifer
Director

DRK:ams

Encl.

APPENDIX 45 - LETTER OF DAVID R. KEIFER, DELAWARE PLANNING OFFICE, TO BARRY HUNSAKER, VICE PRESIDENT, EL PASO EASTERN COMPANY, DATED MARCH 17, 1972.

March 17, 1972

CERTIFIED MAIL No. 879820

Mr. Barry Hunsaker
Vice President
El Paso Eastern Company
2727 Allen Parkway
Houston, Texas 77019

Dear Mr. Hunsaker:

This is in reply to your letter of March 3, 1972, on the subject of the pier for your proposed liquified natural gas terminal and your request regarding my letter of February 23, 1972, rendering a decision on that project proposal under the Coastal Zone Act.

Following our meeting where you outlined the project, in your letter of December 21, 1971, your stated, "El Paso Eastern Company will, therefore, seek approval for the installation and operation of the terminal from the states of Delaware and New Jersey." In that letter you also noted that I had suggested that you write to me concerning the project so that I could consider it and comment on it in the context of the Coastal Zone Act. My comment on the project was the status decision in my letter of February 23, 1972.

In your letter of March 3, 1972, you said that it was decided a few days prior to receiving my letter of February 23, 1972,

to abandon the project. Certainly you have the right to abandon the project. However, I do not feel that I can withdraw my status decision. Since, as you say, the decision to abandon this project was made prior to your having any knowledge of my status decision the reason for abandoning the project cannot be my decision. It would seem to be illogical to expect an appeal from a decision prohibiting a project which had previously been voluntarily abandoned. Your failure to appeal my status decision is understandable by the logic of the situation, rather than as an acquiesence to the decision.

If I should now withdraw my decision and you decided at some time to go ahead with this project, you would already know my status decision and would, therefore, have more than the time specified by the Act and more time than allowed to all other applicants to prepare your appeal.

The Coastal Zone Act provides that a final decision of the State Planner can be appealed. A status decision that a project is prohibited in the coastal zone is a final decision; otherwise it could not be appealed. My decision in this letter denying your request to withdraw the status decision of February 23, 1972, is not covered by appeal provisions of the law. I believe that my decision here is proper under terms of the Coastal Zone Act.

Sincerely,

David r. Keifer
Director

DRK:ams

APPENDIX 46 – 40 DELAWARE LAWS CHAPTER 179 (1935)

40 Del. Laws ch. 179 (1935)

WILMINGTON
AN ACT RELATING TO THE
BOUNDARIES OF THE MAYOR
AND COUNCIL OF WILMINGTON

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met (two-thirds of each Branch thereof concurring therein):

Section 1. That Section 1 of Chapter 207, Volume 17, Laws of Delaware, approved April 13, A. D. 1883, and all Acts amendatory thereof or supplemental thereto, be and the same are hereby further amended by striking out said Section and inserting in lieu thereof the following:

Section 1. The City of Wilmington shall be bounded as follows:

BEGINNING at a monument upon the present westerly bank of the Delaware River, said monument being located 2688.63 feet easterly from the extension of the center line of Todds Lane (as the latter is established between Bowers Street and Edge Moor Avenue) measured perpendicularly thereto, and 4392.47 feet southerly from the center line of Edge Moor Avenue (as the latter is established between Todds Lane and Eastlawn Avenue) measured perpendicularly thereto; thence northwesterly on a direct line towards the monument located at the intersection of the center lines of Todds Lane and Edge Moor Avenue, a

distance of 3200 feet more or less to its intersection with a line drawn perpendicularly to Market Street (as the latter is at present established between Thirtieth and Thirty-sixth Streets) through a point 77 feet northeasterly from the center line of Thirty-sixth Street, measured along the said center line of Market Street; thence northerly perpendicular to Market Street as aforesaid 5500 feet more or less to the northwesterly side of Market Street as the same is established at 65 feet 6 inches in width; thence northeasterly along the said northwesterly side of Market Street 2500 feet more or less to its intersection with the southwesterly property line of the Diamond State Amusement Company, said intersection being approximately 730 feet northeasterly from the center line of Forty-third Street, measured along the said side of Market Street; thence north 23 degrees 35 minutes west, along the said property line, a distance of 524.31 feet more or less to a concrete monument; thence north 19 degrees 12 minutes west, along the same property line, a distance of 823.3 feet to a corner of said property; thence north 68 degrees 28 minutes east continuing along the property division line 57.60 feet to a point; thence south 57 degrees 21 minutes east along the property division line 470.2 feet to a point; thence north 26 degrees 26 minutes east along the property division line 264 feet to a point; thence north 18 degrees 1 minute east along the property division line 369.6 feet to a point; thence north 3 degrees 53 minutes east along the property division line 220 feet more or less to the center line of Talley Road, thence northwesterly along the center line of said Talley Road following the various courses and distances thereof to its intersection with the center line of Miller Road; thence southwesterly along the center line of Miller Road following its various courses and distances to

its intersection with a line drawn parallel to Thirty-seventh and Thirty-eighth Streets and midway between the said Streets; thence southeasterly parallel to Thirty-seventh and Thirty-eighth Streets and midway between them 1050 feet more or less to a point midway between Harrison and Franklin Streets, as the latter are at present established upon the official map or plan of the City of Wilmington; thence southwesterly along a line midway between Harrison and Franklin Streets 1000 feet, more or less to a point distant 600 feet northeasterly from the northeasterly side of 32nd Street measured at right angles thereto; thence northwesterly parallel to 32nd Street and distant 600 feet northwesterly therefrom 750 feet, more or less, to the northwesterly side of Miller Road; thence southwesterly along the said side of Miller Road 650 feet more or less to the southwesterly side of 34th Street extended (as the same is established between Market and Van Buren Streets; thence northwesterly along the said extension of the said southwesterly side of Thirty-fourth Street 300 feet more or less to the center line of the right of way of the Baltimore & Ohio Railroad); thence in a southwesterly direction following the said center line of the Baltimore & Ohio Railroad right of way 4100 feet more or less to the center line of 18th Street extended, as the latter is established southeast of Broom Street; thence westerly at right angles to Concord Avenue and along the present City boundary line 1600 feet more or less to the center line of Brandywine Creek; thence following along the center line of Brandywine Creek in a northerly and westerly direction 7800 feet more or less to its intersection with the extension of the easterly side of Rising Sun Lane; thence southwesterly along the said side of Rising Sun Lane 2600 feet more or less to a point distant 150 feet southwesterly

from the southwesterly side of Pennsylvania Avenue measured at right angles thereto; thence southeasterly and parallel to the said side of Pennsylvania Avenue 1900 feet more or less to the northwesterly side of Greenhill Avenue; thence southwesterly along the said side of Greenhill Avenue 1950 feet more or less to the northeasterly side of 7th Street; thence northwesterly along the said side of 7th Street extended 2750 feet more or less to the center line of DuPont Road; thence southerly along the center line of DuPont Road 2200 feet more or less to the southerly side of Lancaster Avenue extended, as the latter is established between Union Street and Greenhill Avenue; thence southeasterly along the said side of Lancaster Avenue, extended, 2100 feet more or less to the southeasterly side of Greenhill Avenue extended; thence southwesterly along the said side of Greenhill Avenue extended 600 feet more or less to the center line of Linden Street extended, as the latter is established between Van Buren and Union Streets; thence southeasterly along the center line of Linden Street extended 1100 feet more or less to the center line of Woodlawn Ave. extended, as the latter is established between Lancaster and Pennsylvania Avenue; thence southwesterly along the said center line of Woodlawn Avenue extended 2700 feet more or less to the northerly side of the right of way of the P. & R. Railroad; thence southeasterly along the said northerly side of the right of way of the P. & R. Railroad 1400 feet more or less to a point on an extension of the mid distant line between Lincoln and Union Streets; thence northeasterly along said mid distant line and parallel to Union Street 1700 feet more or less to the present City boundary line; thence southerly along the present City boundary line 2800 feet more or less to the center line of Maryland Avenue; thence southerly

continuing along the present City boundary line 2200 feet more or less to the center line of the right of way of the main line of the Pennsylvania Railroad; thence northeasterly along said right of way center line and along the present City boundary line about 2900 feet to the westerly side of Beech Street extended, as the latter is laid out southerly from and at right angles to Maryland Avenue; thence southerly along the said side of Beech Street extended and along the present City boundary line 2800 feet more or less to a point distant 450 feet southwesterly from the southwesterly side of "F" Street measured at right angles thereto; thence southeasterly parallel to "F" Street 7800 feet more or less to the southeasterly side of the right of way of the New Castle Branch of the P. B. & W. Railroad; thence in a southeasterly direction along the said right of way of the New Castle Branch of the P. B. & W. Railroad to its intersection with the northerly side of the right of way of the P. & R. Railroad; thence south 37 degrees 28 minutes .ast along the said northerly side of the right of way of the P. & R. Railroad (as the latter is established upon its plans between Stations 155 and 160) and continuing thence south 37 degrees 28 minutes east across the Delaware River to low water mark upon the easterly side of the Delaware River; thence northeasterly along the said low water line of the easterly side of the Delaware River to a point due east of the monument first mentioned upon the westerly bank of the said river; thence due westerly and re-crossing the Delaware River to the monument at the place of BEGINNING.

Within the limits of the territory by this Act included within and made part of the City of Wilmington, The Mayor and Council of Wilmington shall be and is

hereby vested with all the powers, rights, privileges and immunities which by law appertain and belong to it as a municipal corporation, and all the laws or ordinances and regulations in force within the limits of the City of Wilmington, as heretofore existing, and not locally inapplicable, shall be extended and applied to the territory comprised within the boundaries as set forth herein.

The real estate by this Act added to and included within the boundaries of the City of Wilmington, and all persons now or hereafter residing within the said boundaries shall be subject to assessment for municipal taxes in the same manner and subject to the same rights, rules and restrictions as in other cases within the said City, except that no property situated within that part of the City of Wilmington which shall have become a part of the said City by virtue of this Act shall be taxable until the final determination of the effect of an agreement or compact entered into in the year 1905 between the States of New Jersey and Delaware, known as the compact of 1905, and referred to in the opinion of the Supreme Court of the United States in the case entitled "New Jersey v. Delaware", reported in 291 U. S. 361. The word "determination" as herein used may refer either to agreement between the said States or to a final Court adjudication.

Approved April 11, 1935.

APPENDIX 47 – WILMINGTON CITY CODE ADOPTED JUNE 17, 1993, SECTIONS 1-100 AND 1-1

WILMINGTON CITY CODE

Published by Order of the City Council

Adopted June 17, 1993
Effective July 1, 1993

Published by Municipal Code Corporation
Tallahassee, Florida 1993

* * *

PART I

CHARTER AND RELATED LAWS

Subpart A. CHARTER

ARTICLE I. INCORPORATION; POWERS OF CITY GENERALLY

Sec. 1-100. Incorporation.

The inhabitants of the City of Wilmington, within the corporate limits as now established in 40 Delaware Laws, Chapter 179, as amended by 46 Delaware Laws, Chapter 236, or as hereinafter established in the manner provided by law, shall continue to be a municipal corporation and body

Appendix 47

politic under the style and name of "The City of Wilmington," and shall hereinafter be referred to as the "city."

* * *

Subpart B. RELATED LAWS

Title 1 GENERAL PROVISIONS

Sec. 1-1. Corporate boundaries described; powers of city generally, etc.

The city shall be bounded as follows:

Beginning at a monument upon the present westerly bank of the Delaware River, said monument being located 2688.63 feet easterly from the extension of the center line of Todds Lane (as the latter is established between Bowers Street and Edge Moor Avenue) measured perpendicularly thereto, and 4392.47 feet southerly from the center line of Edge Moor Avenue (as the latter is established between Todds Lane and Eastlawn Avenue) measured perpendicularly thereto; thence northwesterly on a direct line towards the monument located at the intersection of the center lines of Todds Lane and Edge Moor Avenue, a distance of 3,200 feet more or less to its intersection with a line drawn perpendicularly to Market Street (as the latter is at present established between 30th and 36th Streets) through a point 77 feet northeasterly from the center line of 36th Street, measured along the said center line of Market Street; thence northerly perpendicular to Market Street as aforesaid 5500 feet more or less to the northwesterly side of Market

Street as the same is established at 65 feet 6 inches in width; thence northeasterly along the said northwesterly side of Market Street 2500 feet more or less to its intersection with the southwesterly property line of the Diamond State Amusement Company, said intersection being approximately 730 feet northeasterly from the center line of Forty-third Street, measured along the said side of Market Street; thence north 23 degrees 35 minutes west, along the said property line, a distance of 524.31 feet more or less to a concrete monument; thence north 19 degrees 12 minutes west, along the same property line, a distance of 823.3 feet to a corner of said property; thence north 68 degrees 28 minutes east continuing along the property division line 57.60 feet to a point; thence south 57 degrees 21 minutes east along the property division line 470.2 feet to a point; thence north 26 degrees 26 minutes east along the property division line 264 feet to a point; thence north 18 degrees 1 minute east along the property division line 369.6 feet to a point; thence north 3 degrees 53 minutes east along the property division line 220 feet more or less to the center line of Rockwood Road, thence northwesterly along the center line of said Rockwood Road following the various courses and distances thereof to its intersection with the center line of Miller Road; thence southwesterly along the center line of Miller Road following its various courses and distances to its intersection with a line drawn parallel to Thirty-seventh and Thirty-eighth Streets and midway between the said Streets; thence southeasterly parallel to Thirty-seventh and Thirty-eighth Streets and midway between them 1050 feet more or less to a point midway between Harrison and Franklin Streets, as the latter are at present established upon the official map or plan of the city, thence southwesterly along a line midway between Harrison and Franklin Streets 1000 feet, more or

less to a point distant 600 feet northeasterly from the northeasterly side of 32nd Street measured at right angles thereto; thence northwesterly parallel to 32nd Street and distant 600 feet northwesterly therefrom 750 feet, more or less, to the northwesterly side of Miller Road; thence southwesterly along the said side of Miller Road 650 feet more or less to the southwesterly side of 34th Street extended (as the same is established between Market and Van Buren Streets; thence northwesterly along the said extension of the said southwesterly side of Thirty-fourth Street 300 feet more or less to the center line of the right of way of the Baltimore & Ohio Railroad); thence in a southwesterly direction following the said center line of the Baltimore & Ohio Railroad right of way 4100 feet more or less to the center line of 18th Street extended, as the latter is established southeast of Broom Street; thence westerly at right angles to Concord Avenue and along the present city boundary line 1600 feet more or less to the center line of Brandywine Creek; thence following along the center line of Brandywine Creek in a northerly and westerly direction 7800 feet more or less to its intersection with the extension of the easterly side of Rising Sun Lane; thence southwesterly along the said side of Rising Sun Lane 2600 feet more or less to a point distant 150 feet southwesterly from the southwesterly side of Pennsylvania Avenue measured at right angles thereto; thence southeasterly and parallel to the said side of Pennsylvania Avenue 1900 feet more or less to the northwesterly side of Greenhill Avenue; thence southwesterly along the said side of Greenhill Avenue 1950 feet more or less to the northeasterly side of 7th Street; thence northwesterly along the said side of 7th Street extended 2750 feet more or less to the center line of DuPont Road; thence southerly along the center line of DuPont Road

2200 feet more or less to the southerly side of Lancaster Avenue extended, as the latter is established between Union Street and Greenhill Avenue; thence southeasterly along the said side of Lancaster Avenue, extended, 2100 feet more or less to the southeasterly side of Greenhill Avenue extended; thence southwesterly along the said side of Greenhill Avenue extended 600 feet more or less to the center line of Linden Street extended, as the latter is established between Van Buren and Union Streets; thence southeasterly along the center line of Linden Street extended 1100 feet more or less to the center line of Woodlawn Ave. extended, as the latter is established between Lancaster and Pennsylvania Avenue; thence southwesterly along the said center line of Woodlawn Avenue extended 2700 feet more or less to the northerly side of the right of way of the P. & R. Railroad; thence southeasterly along the said northerly side of the right of way of the P. & R. Railroad 1400 feet more or less to a point on an extension of the mid distant line between Lincoln and Union Streets; thence northeasterly along said mid distant line and parallel to Union Street 1700 feet more or less to the present city boundary line; thence southerly along the present city boundary line 2800 feet more or less to the center line of Maryland Avenue; thence southerly continuing along the present city boundary line 2200 feet more or less to the center line of the right of way of the main line of the Pennsylvania Railroad; thence northeasterly along said right of way center line and along the present city boundary line about 2900 feet to the westerly side of Beech Street extended, as the latter is laid out southerly from and at right angles to Maryland Avenue; thence southerly along the said side of Beech Street extended and along the present city boundary line 2800 feet more or less to a point distant 450 feet southwesterly from the southwesterly side of "F" Street

measured at right angles thereto; thence southeasterly parallel to "F" Street 7800 feet more or less to the southeasterly side of the right of way of the New Castle Branch of the P. B. & W. Railroad; thence in a southeasterly direction along the said right of way of the New Castle Branch of the P. B. & W. Railroad to its intersection with the northerly side of the right of way of the P. & R. Railroad; thence south 37 degrees 28 minutes east along the said northerly side of the right of way of the P. & R. Railroad (as the latter is established upon its plans between Stations 155 and 160) and continuing thence south 37 degrees 28 minutes east across the Delaware River to low water mark upon the easterly side of the Delaware River; thence northeasterly along the said low water line of the easterly side of the Delaware River to a point due east of the monument first mentioned upon the westerly bank of the said river; thence due westerly and re-crossing the Delaware River to the monument at the place of beginning.

Within the limits of the territory by this section included within and made part of the city, the city shall be and is hereby vested with all the powers, rights, privileges and immunities which by law appertain and belong to it as a municipal corporation, and all the laws or ordinances and regulations in force within the limits of the city, as heretofore existing, and not locally inapplicable, shall be extended and applied to the territory comprised within the boundaries as set forth herein.

The real estate by this section added to and included within the boundaries of the city, and all persons now or hereafter residing within the said boundaries shall be subject to assessment for municipal taxes in the same manner and

subject to the same rights, rules and restrictions as in other cases within the said city, except that no property situated within that part of the city which shall have become a part of the said city by virtue of this section shall be taxable until the final determination of the effect of an agreement or compact entered into in the year 1905 between the States of New Jersey and Delaware, known as the compact of 1905, and referred to in the opinion of the Supreme Court of the United States in the case entitled "New Jersey v. Delaware," reported in 291 U.S. 361. The word "determination" as herein used may refer either to agreement between the said states or to a final court adjudication.

The boundaries of the city be further extended to include the territory bounded and described as follows, to wit:

Beginning at the intersection of the westerly side of Lincoln Street at 60 feet wide with the southerly side of Oak Street at 50 feet wide; thence easterly along the southerly side of Oak Street 209 feet, 6 inches more or less to a point in the city line; thence, northerly along the said city line, crossing the beds of Oak Street and Lincoln Street, 265 feet, 2 inches more or less to a point in the westerly side of Lincoln Street; thence, southerly along the westerly side of Lincoln Street 162 feet, 6 inches to the point and place of beginning.

Also, beginning at a point in the northeasterly side of Bowers Street (at 60 feet wide), said point being located the two following courses and distances from the intersection of the southeasterly side of Bowers Street (at 60 feet wide) with the northeasterly side of East 35th Street (at 50 feet wide):

Appendix 47

(1) Along the said southeasterly side of Bowers Street as aforesaid in a northeasterly direction 123 feet more or less to a point in the presently existing boundary line of the city and Brandywine Hundred; (2) thence thereby in a northwesterly direction 60 feet to the northeasterly side of Bowers Street as aforesaid; thence from said point of beginning in a northeasterly direction and along the northeasterly side of Bowers Street extended crossing a twenty-five-foot-wide right-of-way formerly of the Pennsylvania Railroad and now assigned to Delwatco, Inc., a Delaware corporation and crossing the Governor Printz Boulevard (at 100 feet wide) a distance of 1,061.30 feet more or less to a point; thence southwesterly by a line deflecting to the right of the last mentioned course by an angle of 133 degrees, 45 minutes, 10 seconds, crossing the Governor Printz Boulevard and crossing a 36-inch interceptor sewer a distance of 543.83 feet more or less to a point; thence in a southwesterly direction by a line deflecting to the right of the last mentioned course by an angle of 46 degrees, 14 minutes, 50 seconds, crossing the aforementioned 25-foot-wide right-of-way formerly of the Pennsylvania Railroad a distance of 685.21 feet more or less to a point in the said presently existing boundary line between the city and Brandywine Hundred; thence thereby in a northwesterly direction 392.10 feet to the point and place of beginning; containing therein approximately 7.549 acres more or less.

Also, beginning at the intersection of the center line of Miller Road with the center line of 43rd Street extension also known as Lea Boulevard at 100 feet wide; thence from said point and place of beginning and along the center line of Miller Road south 55 degrees, 30 minutes west 595.95 feet to a point; thence north 34 degrees, 45 minutes west 144.24

feet to a concrete monument on the southerly side of the Baltimore and Ohio Railroad Co. right-of-way; thence along said railroad right-of-way north 61 degrees 31 minutes east 426.27 feet to a concrete monument; thence continuing along said railroad right-of-way north 57 degrees, 00 minutes, 30 seconds east 322.82 feet to a concrete monument; thence south 40 degrees, 35 minutes, 30 seconds east 71.5 feet to a concrete monument on the northerly side of Miller Road; thence along said side of Miller Road south 55 degrees, 30 minutes west 156.73 feet to a concrete monument; thence south 34 degrees, 30 minutes east 20.00 feet to the point and place of beginning, containing therein 1.828 acres.

Beginning at a point located on the easterly side of a 40 foot wide easement in line of lands now or formerly of Ahmad E. Amer, said point being located the six following courses and distances from the intersection of the easterly side of Marsh Road and the centerline of Beech Street: (1) along line of lands now or formerly of Frank B. Carpenter Realty Co. and along the easterly side of Marsh Road, south 5 degrees 22 minutes, west, 44.35 feet to a point; [(2)] continuing along said line of lands now or formerly of Frank B. Carpenter Realty Co., south 82 degrees 09 minutes east, 30.02 feet to a point; (3) continuing along the said line of lands now or formerly of Frank B. Carpenter Realty Co., south 8 degrees 52 1/2 minutes west, 77.97 feet to a point in line of lands now or formerly of Peter A. Papa, Jr., et ux.; (4) thence along said lands of Peter A. Papa, Jr., et ux., south 5 degrees 44 minutes 30 seconds west, 11.77 feet to a point; (5) thence continuing along said lands of Peter A. Papa, Jr., et ux., south 8 degrees 52 1/2 minutes east, 382.29 feet to a point in line of lands now or formerly of Ahmad E. Amer; (6) thence thereby north 27 degrees 17 1/2 minutes west, 13.56 feet to

the point and place of beginning, which point is located on the easterly side of a 40 foot wide easement and is also in the dividing line between the City of Wilmington and Christiana Hundred, New Castle County; thence from said point of beginning, continuing along the dividing line between the City of Wilmington and Christiana Hundred, north 27 degrees 17 1/2 minutes west, 549.13 feet to a point in line of lands now or formerly of Delmarva Power & Light Co.; thence thereby north 82 degrees 09 minutes west, 621.79 feet to a point located on the easterly side of the Mill Creek Extension of the W.&N.R.R. Railroad; thence thereby the two following courses and distances: (1) south 12 degrees 19 minutes west, 903.48 feet to a point; and (2) south 12 degrees 21 minutes 30 seconds west, 730.03 feet to a point in other lands now or formerly of Delmarva Power & Light Co.; thence thereby the seven following courses and distances: (1) south 77 degrees 38 minutes 30 seconds east, 539.63 feet to a point located on the westerly side of a 40 foot wide private right-of-way; (2) continuing along said private right of way along the arc of a curve to the right in a southerly direction having a radius of 481.50 feet, an arc distance of 49.58 feet to a point; (3) continuing along said private right-of-way, south 0 degree 27 minutes 10 seconds west, 285.46 feet to a point; (4) continuing along said private right-of-way, south 1 degree 19 minutes 50 seconds west, 963.92 feet to a point; (5) south 74 degrees 15 minutes east, 65.18 feet to a point; (6) thence south 9 degrees 19 minutes west, 330.29 feet to a point; (7) south 17 degrees 47 minutes west, 263.11 feet to a point located on the northerly side of the Delaware River Extension of the W.&N.R.R. Railroad; thence thereby the two following courses and distances: (1) along the arc of a curve to the left in an easterly direction having a radius of 686.78 feet, an arc distance of 34.24 feet

to a point, which arc is subtended by a chord bearing south 82 degrees 38 minutes 48 seconds east, 34.24 feet; (2) south 84 degrees 4 1/2 minutes east, 17.28 feet to a point located in other lands now or formerly of Delmarva Power & Light Co.; thence thereby the two following courses and distances: (1) north 17 degrees 47 minutes west, 698.27 feet to a point; (2) north 84 degrees 34 1/2 minutes east, 680 feet to a point on the low-water line of the Christina River; thence following the meanderings thereof, 864 feet plus or minus, to a point in line of lands now or formerly of Ahmad E. Amer, said point being the following courses and distances from the last mentioned point: (1) north 1 degree 00 minute east, 770.28 feet to a point; (2) north 2 degrees 17 1/4 minutes west, 87.72 feet; thence along line of lands now or formerly of Ahmad E. Amer, the 12 following courses and distances: (1) north 89 degrees 01 minutes west, 62.53 feet to a point; (2) south 2 degrees 17 1/4 minutes east, 32 feet to a point; (3) north 89 degrees 01 minutes west, 54 feet to a point; (4) north 64 degrees 05 1/2 minutes west, 35.95 feet to a point; (5) north 89 degrees 01 minute west, 395.14 feet to a point; (6) north 1 degree 1 1/2 minutes east, 324.18 feet to a point; (7) south 88 degrees 58 1/2 minutes east, 13.56 feet to a point; (8) north 1 degree 1 1/2 minutes east, 183.64 feet to a point; (9) along the arc of a curve having a radius of 67.24 feet, an arc distance of 12.98 feet to a point, which arc is subtended by a chord bearing north 43 degrees 35 minutes 07 seconds east, 12.96 feet; (10) north 49 degrees 07 seconds east, 255.17 feet to a point; (11) along the arc of a curve to the right having a radius of 121.89 feet, an arc distance of 85.61 feet, which arc is subtended by a chord bearing north 28 degrees 59 minutes 45 seconds east, 83.86 feet; (12) north 8 degrees 52 1/2 minutes east, 709.39 feet to point and place of beginning. Be the contents thereof what they may.

Appendix 47

Also, all that certain piece, parcel or tract of land situate in Brandywine Hundred, New Castle County and State of Delaware, being the portion of Riverside Hospital that is located in Brandywine Hundred containing 1.175 acres, more or less, as shown on a Plan prepared by Howard L. Robertson, Inc., entitled "Osteopathic Hospital Association of Delaware, Riverside Hospital," dated December 12, 1985, and being more particularly bounded and described as follows, to wit: Beginning at the point of intersection of the northwesterly side of Franklin Place (at 80 feet wide) with the northeasterly side of Thirty-Seventh Street (at 80 feet wide); thence from said point of beginning by the aforementioned northeasterly side of Thirty-Seventh Street, north 22 degrees, 19 minutes, 30 seconds west, 615.91 feet to a point; thence by line of lands, now or formerly, of St. Nicholas Church, north 61 degrees, 05 minutes, 00 seconds east, 83.05 feet to a point; thence passing through Riverside Hospital property along the division line between Brandywine Hundred and the City of Wilmington, south 22 degrees, 19 minutes, 30 seconds east, 625.41 feet to a point in the aforementioned northwesterly side of Franklin Place; thence thereby south 67 degrees, 39 minutes, 00 seconds west, 82.50 feet to the place of beginning, containing within said bounds 1.175 acres, be the same, more or less.

(40 Del. L. ch. 179, § 1; 46 Del. L. ch. 236, § 1; Ord. No. 68-090, § 1; Ord. No. 71-045, § 1; Ord. No. 79-045, §§ 1, 2, 7-26-79; Ord. No. 88-001, 3-7-88; Ord. No. 88-102, § 4, 1-12-89)

APPENDIX 48 – REPORT OF NEW JERSEY COMMISSIONERS, MARCH 16, 1903

STATE OF NEW JERSEY,
EXECUTIVE DEPARTMENT,
TRENTON, March 17th, 1903.

To the House of Assembly:

I have the honor to transmit herewith the report of the Commissioners appointed to confer with like Commissioners from the State of Delaware upon the boundary line between the States of New Jersey and Delaware.

Respectfully,
FRANKLIN MURPHY,
Governor.

To the Senate and General Assembly of the State of New Jersey:

The undersigned Commissioners, appointed by joint resolution of the Legislature, approved March 5th, 1903, to meet with similarly appointed Commissioners from the State of Delaware, to frame a compact, or agreement, between the said States, and legislation consequent thereon, to be submitted to the Legislatures of said two States, for action thereon, looking to the amicable termination of the suit between said States now pending in the Supreme Court of the United States, and final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River, hereby report that on

Appendix 48

Thursday, the 12th day of March, and again on Saturday, the 14th day of March, 1903, they met for the purposes aforesaid in the City of Philadelphia, with the Commissioners on the part of the State of Delaware, who were John Hunn, Governor of Delaware, Herbert H. Ward, Attorney-General of Delaware, and the Hon. George H. Bates; that after a thorough consideration of all the differences between the two States an agreement was reached and a compact prepared, subject to ratification by the Legislatures of the respective States, and the consent and approval of Congress. The compact received the unanimous endorsement of all the Commissioners from both States. It is herewith submitted as part of a proposed act, which, it is strongly recommended, should be enacted by the Legislature of this State at its present session. Your Commissioners feel that while it was not found practicable to settle the exact geographical boundary line between the two States, nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time. At the same time the interests of our sister State of Delaware have been amply safeguarded in a manner acceptable to the Commissioners from that State.

In witness whereof your Commissioners have hereunto set their hands this sixteenth day of March, nineteen hundred and three.

FRANKLIN MURPHY,
THOS. N. MCCARTER,
EDWARD C. STOKES.

GRANTED

FILED
DEC 28 200
OFFICE OF THE CLE

No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Bill of Complaint

ANSWER OF STATE OF DELAWARE AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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December 28, 2005

No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Bill of Complaint

ANSWER OF STATE OF DELAWARE

The State of Delaware, by its Attorney General and special counsel, and pursuant to this Court's order dated November 28, 2005, hereby treats the Petition for a Supplemental Decree filed by the State of New Jersey on July 28, 2005, in No. 11, Original, as a Bill of Complaint in No. 134, Original ("Complaint"), and for its Answer admits, denies, and alleges as follows:

1. The allegations of paragraph 1 of the Complaint are admitted only inasmuch as that paragraph accurately quotes a portion of the text of the 1935 Decree issued by this Court in No. 11, Original, *New Jersey v. Delaware*, 295 U.S. 694, 698 (1935). To the extent New Jersey intends by setting forth that quotation to allege that the reopening of No. 11, Original is proper, Delaware denies that allegation. This Court denied New Jersey's motion to reopen No. 11, Original, and for a supplemental decree by

Order dated November 28, 2005. *See New Jersey v. Delaware*, 126 S. Ct. 713 (2005).

2. The allegations of paragraph 2 of the Complaint are denied, as Delaware maintains its position that New Jersey cannot demonstrate any concrete injury caused by Delaware sufficient to invoke this Court's original jurisdiction because New Jersey itself has yet to approve B.P. p.l.c.'s ("BP") proposed Crown Landing project under New Jersey's own Coastal Zone Management Rules. Likewise, the Federal Energy Regulatory Commission ("FERC") and other federal agencies have not yet completed their review and could therefore deny permission to construct the proposed project. Wholly apart from that absence of the requisite concrete injury, this Court also lacks jurisdiction because BP, not the State of New Jersey, is the real party in interest. *See generally* Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree at 25-35 (Oct. 27, 2005) ("DE Opp."). Delaware preserves its previously asserted objections to jurisdiction. In addition, Delaware reserves its right to assert other appropriate objections to jurisdiction based on the further evidence to be developed or discovered in this case.

3. Delaware is without knowledge or information sufficient to form a belief as to whether New Jersey's Complaint was filed with the authority of the appropriate New Jersey public officials.

4. Delaware admits only that New Jersey seeks the relief set forth in paragraph 4 of the Complaint; Delaware expressly denies that New Jersey is entitled to such relief as set forth below in this Answer. *See generally* DE Opp.

5. The allegations of the first sentence of paragraph 5 of the Complaint are admitted insofar as the quotation accurately states what this Court wrote in *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). The second sentence of paragraph 5 of the Complaint is denied. Delaware admits the third sentence of paragraph 5 of the

Complaint. *See id.* at 364 ("Delaware makes the division at the geographical center."). The remaining allegations of paragraph 5 of the Complaint are admitted, except it is denied that Delaware traced its title to the lands within the twelve-mile circle solely to the deed of feoffment and lease on August 24, 1682, from the Duke of York to William Penn. *See id.* at 366 ("On March 22, 1682/3, letters patent under the Great Seal of England were issued to the Duke of York for the identical lands and waters described in the deed of feoffment from York to William Penn. . . . By force of this grant there passed to the Duke of York a title to the land within the circle which inured by estoppel to the grantee under the feoffment.").

6. The allegations of paragraph 6 of the Complaint are denied. This Court's discussion of Delaware's chain of title in *New Jersey v. Delaware*, 291 U.S. 361 (1934), speaks for itself, as does the Court's conclusion that "Delaware's chain of title . . . from the feoffment of 1682 to the early days of statehood . . . has been found to be unbroken." *Id.* at 374.

7. The allegations of paragraph 7 of the Complaint are admitted. New Jersey filed its Bill of Complaint on March 13, 1877, and obtained a preliminary injunction on March 26, 1877, on an incomplete record. Subsequently, after examining all of the facts, the Court unanimously rejected New Jersey's claim to jurisdiction to the middle of the Delaware River and confirmed Delaware's sovereignty over the twelve-mile circle up to the low-water mark on the New Jersey shore. *New Jersey v. Delaware*, 291 U.S. at 384.

8. The allegations of paragraph 8 of the Complaint are admitted, except that Delaware denies New Jersey's alleged characterizations that the Delaware legislature "failed to approve" a compact in 1903 and that, in 1905, the commissioners "quickly agreed" to the same provisions as in 1903.

9. The allegations of paragraph 9 of the Complaint are admitted, insofar as paragraph 9 accurately sets forth Article VII of the Compact of 1905 between New Jersey and Delaware ("1905 Compact" or "Compact") and New Jersey rests its present arguments on that Article. Delaware has offered a preliminary analysis opposing New Jersey's interpretation, *see* DE Opp. 35-75, and reserves the right to submit further analysis.

10. The allegations of paragraph 10 of the Complaint are admitted.

11. The allegations of the first and third sentences of paragraph 11 of the Complaint are admitted, as the 1905 Compact "did not settle the boundary line" between Delaware and New Jersey and Article VI had indeed "left open" disputes concerning oyster beds. Article VII likewise left open the scope of riparian jurisdiction that could lawfully be exercised by each State through, among other things, the use of the phrase "on its own side of the river." In 1934, this Court established the boundary line at the low-water mark on the New Jersey shore, and thus the dividing line between each State's "own side of the river." The allegations of the second and fourth sentences of paragraph 11 of the Complaint are denied. The dispute referred to therein occurred in 1927, and the Court granted leave to file a bill of complaint in 1929. The allegations of the fifth, sixth, and seventh sentences of paragraph 11 of the Complaint are admitted.

12. The allegations of paragraph 12 of the Complaint are admitted.

13. The allegations of paragraph 13 of the Complaint are admitted.

14. Delaware admits that paragraph 14 of the Complaint accurately sets forth selected portions of paragraphs 5, 6, and 7 of the 1935 Decree.

15. The allegations of paragraph 15 of the Complaint are denied, except it is admitted that since the 1800s New Jersey has adopted certain statutes purporting to regulate riparian rights and riparian lands.

16. The allegations of paragraph 16 of the Complaint are admitted only insofar as New Jersey purported to issue the five grants referenced in paragraph 16 between 1854 and 1871. New Jersey purported to issue those grants after the decision in *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848), which confirmed Delaware's sovereignty over the twelve-mile circle in an analysis that this Court later praised as a "careful and able statement of the conflicting claims of right." *New Jersey v. Delaware*, 291 U.S. at 373, 377. This Court held that "there can be no legitimate inference that Delaware made over to New Jersey the title to the stream up to the middle of the channel or even the soil under the piers. The privilege or license was accorded to the owners individually and even as to them was bounded by the lines of their possession." *Id.* at 375-76.

17. The allegations of paragraph 17 of the Complaint are denied. The special master appointed by this Court in 1929 noted in his report that the grants referred to in paragraph 17 were "few" and "were all issued, and the improvements erected after the institution of the suit by [New Jersey] against [Delaware] in 1877." *New Jersey v. Delaware*, 55 S. Ct. 934, 954-55 (1935).

18. Delaware presently is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 18 of the Complaint. The allegations of the second sentence of paragraph 18 of the Complaint are denied. New Jersey had no power to "authorize" the construction of structures on Delaware's subaqueous soil. Delaware is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning purported "riparian grants" in the third sentence of paragraph 18 of the Complaint and therefore denies same; moreover, New Jersey had no power to issue riparian grants of Delaware's sovereign lands.

19. The allegations of paragraph 19 of the Complaint are denied, except it is admitted that paragraph 19

accurately sets forth selected portions of the record in the case referred to therein, and that Mr. Southerland, who was one of several counsel representing Delaware in that case, served as the attorney general of Delaware in the 1920s and as the first Chief Justice of Delaware's separately constituted supreme court from 1951 to 1963. New Jersey's reliance on the quoted statements is misplaced for multiple reasons that Delaware has previously set forth, in part, in its Opposition and will elaborate upon further after appropriate discovery. *See* DE Opp. 68-72.

20. The allegations of the first sentence of paragraph 20 of the Complaint are denied, except it is admitted that on December 2, 1957, a private lawyer retained by the State Highway Department, S. Samuel Arsht, Esquire, sent a letter to the State Highway Department concurring with an interpretation of the Compact put forward by DuPont's counsel, without any indication that either counsel was aware of the 1954 Formal Opinion of the New Jersey Attorney General directly contrary to the opinion of DuPont's counsel. The remaining allegations of paragraph 20 of the Complaint are denied, except it is admitted that paragraph 20 accurately sets forth portions of a letter dated December 13, 1957 from an official at the State Highway Department to an official at the U.S. Army Corps of Engineers. The State Highway Department did not adopt Mr. Arsht's concurrence with DuPont's counsel's mistaken interpretation of the 1905 Compact. *See also* DE Opp. 67-68. Delaware has exercised its sovereign right to regulate structures located on its subaqueous soil on many occasions. *See id.* at 61-66.

21. The allegations of paragraph 21 of the Complaint are denied. Delaware has numerous permitting requirements applicable to waterway construction activities including, without limitation, permits relating to coastal zone status, coastal zone consistency, subaqueous lands, water allocation, water discharge, historic preservation, beaches, wetlands, and air quality.

Most but not all of these permitting programs are administered by the Delaware Department of Natural Resources and Environmental Control ("DNREC").

22. The allegations of the first sentence of paragraph 22 of the Complaint are admitted. The remaining allegations of paragraph 22 of the Complaint are admitted to the extent that New Jersey has accurately set forth selected portions of the Delaware Coastal Zone Act ("DCZA").

23. The allegations of the first sentence of paragraph 23 of the Complaint are admitted. The allegations of the second sentence of paragraph 23 of the Complaint are denied. In 1972, New Jersey was made aware of, and voiced no objection to, Delaware's rejection under the DCZA of a proposal by the El Paso Eastern Company to construct a liquefied natural gas processing terminal in Delaware waters off the New Jersey shore. *See* DE Opp. 63 & n.35. Indeed, New Jersey has now functionally conceded that this allegation is incorrect. *See* NJ Reply 6 n.1. Additional investigation and discovery may yield evidence on whether any other applications for a DCZA permit relating to "an improvement appurtenant to the New Jersey shore" have been or should have been made.

24. The allegations of the first sentence of paragraph 24 of the Complaint are admitted. The remaining allegations of paragraph 24 of the Complaint are admitted insofar as paragraph 24 accurately sets forth selected portions of the Subaqueous Lands Act. Delaware began regulating the use of its subaqueous soil within the twelve-mile circle well before the adoption of the Subaqueous Lands Act in 1986; further, New Jersey applied for and obtained a license from Delaware under the Subaqueous Lands Act in 1996, and expressed no objection to Delaware's application of the Subaqueous Lands Act, or its predecessor statutes, until 2005. Delaware has consistently exercised its sovereign right to regulate riparian structures located on its subaqueous soil on many occasions. *See* DE Opp. 61-66.

25. The allegations of the first sentence of paragraph 25 of the Complaint are denied. The remaining allegations of paragraph 25 of the Complaint are admitted. Since 1961, Delaware has issued at least 11 subaqueous land leases and/or permits for the use of Delaware's subaqueous lands within the twelve-mile circle for projects entering Delaware territory from the New Jersey shore. *See* DE Opp. 61-62; DE App. 66a-68a (Maloney Aff. ¶¶ 3-14).

26. The allegations of the first sentence of paragraph 26 of the Complaint are admitted. The allegations of the second sentence of paragraph 26 of the Complaint are denied. BP's proposed structure would extend approximately 2,000 feet into Delaware's sovereign territory. In addition, while New Jersey here claims that BP's proposed facility would require 800,000 cubic yards of Delaware's subaqueous soil to be dredged from the riverbed, *see, e.g.*, NJ App. 135a (Segal Aff. ¶ 4), recent filings by BP with FERC have increased that already enormous dredging estimate by more than 50%, to 1.24 million cubic yards. *See* Berth Design Revision at 1-2, Docket No. CP04-411-000 (FERC filed Dec. 1, 2005).

27. The allegations of paragraph 27 of the Complaint are denied, except it is admitted that paragraph 27 accurately sets forth a portion of a letter dated April 18, 2005, from the New Jersey Board of Public Utilities to FERC. The New Jersey Board's letter also states that "all environmental and safety concerns" should be "adequately addressed."

28. The allegations of paragraph 28 of the Complaint are admitted.

29. The allegations of the first sentence of paragraph 29 of the Complaint are admitted. The remaining allegations of paragraph 29 of the Complaint are denied, except it is admitted that on February 3, 2005, the Secretary of Delaware's DNREC issued a decision concluding that under the DCZA the Crown Landing project was a prohibited "offshore bulk product transfer

facility" and a prohibited "heavy industry," and it is further admitted that paragraph 29 of the Complaint accurately sets forth a selected portion of the Secretary's decision.

30. The allegations of the first and third sentences of paragraph 30 of the Complaint are admitted. The allegations of the second sentence of paragraph 30 of the Complaint are denied. Delaware's Coastal Zone Industrial Review Board ("CZIRB") announced its decision after a lengthy public hearing on March 30, 2005, and issued a detailed written decision and order dated April 14, 2005. *See* DE App. 51a-61a. In its appeal to the CZIRB, BP chose not to argue that Delaware lacked jurisdiction over the project based on the 1905 Compact. In addition, BP chose not to appeal the CZIRB's decision to the Delaware Superior Court, thus forfeiting its right to seek review of that decision by the Delaware Superior Court, the Supreme Court of Delaware, and this Court on writ of certiorari. *See* DE Opp. 32-35.

31. The allegations of paragraph 31 of the Complaint are denied. The 1905 Compact provides that any riparian jurisdiction possessed by New Jersey is limited to jurisdiction exercised within New Jersey's territory, which this Court unanimously held in 1934 extends only to the low-water mark on the New Jersey shore inside the twelve-mile circle. *See* DE Opp. 35-75. Moreover, the 1905 Compact makes clear that New Jersey has no "exclusive" jurisdiction over Delaware's sovereign lands. *See id.* at 56-58. Delaware is not precluded by the 1905 Compact from exercising other forms of jurisdiction within its sovereign territory, such as jurisdiction over how its coastal zone is used. *See, e.g., id.* at 53-56.

32. The allegations of the first sentence of paragraph 32 of the Complaint are admitted. The allegations of the second sentence of paragraph 32 of the Complaint are denied, except it is admitted that paragraph 32 of the Complaint accurately sets forth a portion of a letter dated May 6, 2005. Fenwick Commons agreed that "Delaware is

the owner of ungranted subaqueous lands lying beneath the waters of Delaware Bay." The remaining allegations of paragraph 32 of the Complaint are admitted.

33. The allegations of the second sentence of paragraph 33 of the Complaint are admitted. Delaware is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 33 of the Complaint, and therefore denies same.

34. The allegations of paragraph 34 of the Complaint are denied. *See also supra* ¶ 31.

35. The allegations of the first sentence of paragraph 35 of the Complaint are admitted. The allegations of the second sentence of paragraph 35 of the Complaint are denied to the extent they may be read to assert that six municipalities and two counties of New Jersey possess land within the State of Delaware.

36. The allegations of paragraph 36 of the Complaint are denied. *See also supra* ¶ 31.

37. The allegations of paragraph 37 of the Complaint are denied. *See also supra* ¶ 31.

38. The allegations of paragraph 38 of the Complaint are denied. *See also supra* ¶ 31.

39. The allegations of paragraph 39 of the Complaint are denied. *See also supra* ¶ 31.

40. The allegations of the first sentence of paragraph 40 of the Complaint are admitted; the remaining allegations of paragraph 40 of the Complaint are denied. In 1980, the New Jersey Department of Environmental Protection ("NJDEP") acknowledged in a filing to the United States government that "any New Jersey project extending beyond mean low water must obtain coastal permits from both states." *See* DE Opp. 64. More recently, in 2005, the NJDEP advised BP that its proposed Crown Landing project is "subject to Delaware Coastal Zone Management Regulations" to the extent that it involves "activities taking place from the mean low

water line . . . outshore" from New Jersey. *See id.* at 64-65.

41. The allegations of paragraph 41 of the Complaint are denied, except it is admitted that paragraph 41 accurately sets forth a selected portion of a letter from Paul T. Fader, Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, dated April 11, 2005. *See also supra* ¶ 31. In any case, Delaware's exercise of its sovereign right to regulate goes beyond mere "riparian jurisdiction" and is therefore not precluded even under New Jersey's erroneous reading of the scope of New Jersey's "riparian jurisdiction" under the 1905 Compact.

42. The allegations of paragraph 42 of the Complaint are admitted. *See also supra* ¶ 31.

43. The allegations of paragraph 43 of the Complaint are denied, except it is admitted that on May 2, 2005, the New Jersey State Assembly adopted a resolution, which speaks for itself, and that paragraph 43 of the Complaint accurately sets forth a selected portion thereof.

44. The allegations of paragraph 44 of the Complaint are denied, except it is admitted that on June 27, 2005, 31 New Jersey legislators introduced a bill that speaks for itself.

45. The allegations of paragraph 45 of the Complaint are denied, except it is admitted that on June 29, 2005, two Delaware legislators introduced a bill that speaks for itself.

AFFIRMATIVE DEFENSES

First Affirmative Defense

New Jersey's claims are barred because this Court either lacks or should decline to exercise jurisdiction.

Second Affirmative Defense

New Jersey's claims are barred by New Jersey's and/or BP's failure to exhaust all state and federal administrative or judicial remedies.

Third Affirmative Defense

New Jersey's allegations fail to state a claim upon which relief may be granted.

Fourth Affirmative Defense

New Jersey's claims are barred by estoppel.

Fifth Affirmative Defense

New Jersey's claims are barred by waiver.

Sixth Affirmative Defense

New Jersey's claims are barred by consent.

Seventh Affirmative Defense

New Jersey's claims are barred by laches.

Eighth Affirmative Defense

New Jersey's claims are barred by the doctrines of severability and unenforceability.

Prayer For Relief

The State of Delaware prays that judgment be entered:

A. Declaring that Delaware has the right, both as sovereign over all territory within the twelve-mile circle and under the 1905 Compact, to enforce its laws, including its coastal zone, environmental protection, and natural resources statutes; that Delaware, in particular, has the right as sovereign in that territory in the enforcement of its laws as they apply to proposals to construct bulk product transfer facilities and/or heavy industry, or otherwise to use or to disturb the subaqueous soil within Delaware's coastal zone;

B. Enjoining New Jersey, its privies, assigns, lessees, and other persons claiming under it, from interfering with the rights of Delaware of, in, or over the Delaware River within the twelve-mile circle, including without limitation the subaqueous soil thereof; and

C. Granting such further relief as this Court may deem just and proper.

Respectfully submitted,

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December 28, 2005

No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Bill of Complaint

MOTION FOR APPOINTMENT OF SPECIAL MASTER

Defendant, the State of Delaware, by its Attorney General and special counsel, respectfully moves for the appointment of a Special Master in this action and to refer this matter to him or her with authority to take evidence and to report the same to the Court along with findings of fact, conclusions of law, and recommendations for decree, all to be subject to approval or other disposition by the Court.

Background

In 1929, New Jersey filed a second original jurisdiction action in this Court against Delaware to resolve a long-standing boundary dispute between the two States. After appointment of a special master and the taking of evidence, this Court resolved that controversy in 1934 by adopting the recommendation of the special master and holding in relevant part that the boundary within a

twelve-mile circle about the town of New Castle, Delaware, was at the low-water mark on the eastern (or New Jersey) shore of the Delaware River. *See New Jersey v. Delaware*, 291 U.S. 361 (1934) (Cardozo, J.). The Court thus confirmed Delaware's long-standing claim (dating back to a 1682 grant from the Duke of York to William Penn) to title and thus sovereignty over the Delaware River, including its subaqueous soil, within the twelve-mile circle all the way to the low-water mark on the New Jersey shore; and the Court squarely rejected New Jersey's competing claim of title to the center of the navigable channel within the twelve-mile circle. *See id.* at 364-78. The Court's decree stated that it was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states" (herein, the "1905 Compact"), which had addressed disputes between the States other than the boundary dispute. *New Jersey v. Delaware*, 295 U.S. 694, 699 (1935) (No. 11, Orig.).

Relying on that portion of the decree, on July 28, 2005, New Jersey petitioned this Court to reopen No. 11, Original and to issue a supplemental decree. In the alternative, New Jersey asked that its petition be treated as a new bill of complaint. New Jersey's current claim is that Article VII of the 1905 Compact gives New Jersey exclusive "riparian jurisdiction" to approve or deny the proposed erection and/or use of structures extending from the New Jersey shore beyond the low-water mark and thus into Delaware's sovereign territory, and that Delaware has no power to regulate those uses made of its subaqueous soil and the waters above it. The instant dispute arose because Delaware denied a permit sought by a subsidiary of B.P. p.l.c. ("BP") to build a massive liquefied natural gas ("LNG") processing terminal on lands within Delaware's border and subject to Delaware's coastal zone regulations.

Rather than file a traditional bill of complaint, New Jersey initiated this case by filing what was functionally a

motion for summary judgment consisting of 52 pages of legal briefing and a 270-page appendix - half of which consisted of eight newly created affidavits and attachments thereto. *See* Petition for a Supplemental Decree (July 28, 2005) ("NJ Pet."); Brief in Support of Motion To Reopen and for a Supplemental Decree (July 28, 2005) ("NJ Br."). New Jersey argued that the plain language of the 1905 Compact should resolve the case in its favor, *see* NJ Br. 22-27, and that the evidence it had submitted with its brief resolved any material questions of fact in its favor, *see id.* at 27-33. New Jersey then claimed, based on the preceding arguments, that it is unnecessary to appoint a special master. *See id.* at 33-34.

Delaware opposed New Jersey's voluminous filing, arguing that (1) the Court lacks (or should decline to exercise) jurisdiction and (2) New Jersey's claims fail on their merits both because the plain language of the 1905 Compact resolves the dispute in Delaware's favor and, in any case, because the evidence developed at this very early stage of the case showed that New Jersey's claims have no merit. *See* Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree (Oct. 27, 2005) ("DE Opp."). New Jersey filed a reply brief and supplemental appendix, which included still further evidentiary submissions. *See* Reply Brief and Supplemental Appendix in Support of Motion To Reopen and for a Supplemental Decree (Nov. 8, 2005) ("NJ Reply").

After considering those pleadings, on November 28, 2005 this Court denied New Jersey's motion to reopen No. 11, Original but granted New Jersey's alternative request to treat its Petition for a Supplemental Decree as a bill of complaint. *See New Jersey v. Delaware*, 126 S. Ct. 713 (2005). The Court therefore docketed a new case – No. 134, Original – and gave Delaware 30 days within which to file its answer.[1] Delaware files this Motion for

[1] The full text of the Court's November 28, 2005 order is as follows: "The motion to reopen and for supplemental decree is denied. The

Appointment of a Special Master concurrently with its Answer to Bill of Complaint.

Discussion

"The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950). The question whether Delaware continues to have regulatory authority over substantial portions of its own sovereign territory or is powerless to prevent New Jersey from unilaterally placing a massive LNG bulk transfer facility on Delaware soil is certainly one of "high public importance." The dispute now launched by New Jersey arises out of the 1905 Compact, which the States entered into after New Jersey first filed litigation in this Court against Delaware more than a century ago to resolve certain rights pertaining to the boundary between the two States.

As this new suit now comes to this Court, a complete set of the previous litigation records in the previously filed actions by New Jersey is still being compiled and the historical record of riparian uses and exercises of state jurisdiction over such projects is still being researched. Moreover, the history and purposes behind the States' use of certain language in the 1905 Compact is still being investigated. Because the dispute at the heart of New Jersey's complaint requires scrutiny of such litigation records, the development of historical facts (that include different state agency archival materials), and a proper understanding of the legal concepts the parties chose to employ in the 1905 Compact, a special master would be especially helpful in directing the parties' discovery

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alternative motion for leave to file a bill of complaint is granted. The defendant is allowed 30 days within which to file an answer. This proceeding shall be docketed as Case No. 134, Original." 126 S. Ct. at 713.

efforts, refining the issues for this Court's consideration, and offering a recommended disposition of the case.

This Court routinely appoints a special master in cases involving disputes between two States about the meaning of an interstate compact or their respective rights to use the waters of an interstate waterway. *See, e.g.*, *Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Nebraska v. Wyoming*, 515 U.S. 1 (1995) (appointing a special master in a case brought by Nebraska to enforce a 1945 decree by this Court); Robert L. Stern, *et al.*, *Supreme Court Practice* § 10.12, at 576 (8th ed. 2002) ("*Supreme Court Practice*").

Indeed, in the only other instance of which we are aware in which a complainant filed a motion for summary judgment before its motion to file a bill of complaint was granted, the Court appointed a special master after denying summary judgment and granting leave to file the complaint. *See Illinois v. Michigan*, 359 U.S. 963 (1959) ("The motion to advance and for summary judgment is denied. The case is set for argument on the motion for leave to file the complaint."); *Wisconsin v. Illinois*, 360 U.S. 712, 714 (1959) (granting leave to file bill of complaint and appointing special master); *Supreme Court Practice* § 10.12, at 575 n.37 (discussing these cases and explaining that "[w]e know of no other motion for summary judgment prior to filing a complaint in an original case"). This Court's well-settled policy of respecting the sovereign rights of a State by "allowing full development of the facts" on matters of "high public importance" thus strongly counsels in favor of appointing a special master. *United States v. Texas*, 339 U.S. at 715. A special master would be best positioned to consider in the first instance, for example, the extensive historical evidence that each State could be expected to put forward as to the following subjects.

Appointment of a Special Master concurrently with its Answer to Bill of Complaint.

Discussion

"The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950). The question whether Delaware continues to have regulatory authority over substantial portions of its own sovereign territory or is powerless to prevent New Jersey from unilaterally placing a massive LNG bulk transfer facility on Delaware soil is certainly one of "high public importance." The dispute now launched by New Jersey arises out of the 1905 Compact, which the States entered into after New Jersey first filed litigation in this Court against Delaware more than a century ago to resolve certain rights pertaining to the boundary between the two States.

As this new suit now comes to this Court, a complete set of the previous litigation records in the previously filed actions by New Jersey is still being compiled and the historical record of riparian uses and exercises of state jurisdiction over such projects is still being researched. Moreover, the history and purposes behind the States' use of certain language in the 1905 Compact is still being investigated. Because the dispute at the heart of New Jersey's complaint requires scrutiny of such litigation records, the development of historical facts (that include different state agency archival materials), and a proper understanding of the legal concepts the parties chose to employ in the 1905 Compact, a special master would be especially helpful in directing the parties' discovery

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alternative motion for leave to file a bill of complaint is granted. The defendant is allowed 30 days within which to file an answer. This proceeding shall be docketed as Case No. 134, Original." 126 S. Ct. at 713.

efforts, refining the issues for this Court's consideration, and offering a recommended disposition of the case.

This Court routinely appoints a special master in cases involving disputes between two States about the meaning of an interstate compact or their respective rights to use the waters of an interstate waterway. *See, e.g.*, *Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Maryland*, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Nebraska v. Wyoming*, 515 U.S. 1 (1995) (appointing a special master in a case brought by Nebraska to enforce a 1945 decree by this Court); Robert L. Stern, *et al.*, *Supreme Court Practice* § 10.12, at 576 (8th ed. 2002) ("*Supreme Court Practice*").

Indeed, in the only other instance of which we are aware in which a complainant filed a motion for summary judgment before its motion to file a bill of complaint was granted, the Court appointed a special master after denying summary judgment and granting leave to file the complaint. *See Illinois v. Michigan*, 359 U.S. 963 (1959) ("The motion to advance and for summary judgment is denied. The case is set for argument on the motion for leave to file the complaint."); *Wisconsin v. Illinois*, 360 U.S. 712, 714 (1959) (granting leave to file bill of complaint and appointing special master); *Supreme Court Practice* § 10.12, at 575 n.37 (discussing these cases and explaining that "[w]e know of no other motion for summary judgment prior to filing a complaint in an original case"). This Court's well-settled policy of respecting the sovereign rights of a State by "allowing full development of the facts" on matters of "high public importance" thus strongly counsels in favor of appointing a special master. *United States v. Texas*, 339 U.S. at 715. A special master would be best positioned to consider in the first instance, for example, the extensive historical evidence that each State could be expected to put forward as to the following subjects.

Drafting History of the 1905 Compact. The informal discovery propounded by both parties in the short amount of time since this case was filed revealed virtually no documents pertaining to the drafting of the 1905 Compact. It cannot be presumed, however, based on those limited investigations, that no such documents still exist given the historical importance of the 1905 Compact. For example, Delaware plans to search archives, museums, the papers of key participants, and other historical sources that it has not yet had time to investigate. Delaware will also further search its own state files, and will request that New Jersey do the same. Such documents, if they can be found, may be critical to resolving any issues of disputed fact over the proper interpretation of the 1905 Compact.[2]

New Jersey v. Delaware, No. 1, Original, filed 1877. The relevant history of the present dispute dates back even farther than the 1905 Compact. As New Jersey itself explained, the execution of the 1905 Compact terminated the need for litigation concerning fishing

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[2] In its reply brief, New Jersey asserted that the special master in No. 11, Original already compiled all of the evidence of the drafters' intent at the time they signed the Compact, citing portions of only two of the 854 exhibits from that case. *See* NJ Reply 28 (citing Record, No. 11, Orig., Pl. Ex. 161, at 25-45; *id.*, Ex. 162, at 13-20). The cited exhibits consist of state legislative documents authorizing the appointment of commissioners to negotiate what became the 1905 Compact, ratifying the final product, and authorizing commissioners to draft the uniform fishing laws called for in Article IV of the executed 1905 Compact; and a 1907 report by those commissioners on uniform fishing laws. They thus shed little, if any, light on the actual drafting process, or on how the drafters interpreted the language of Article VII. Moreover, No. 11, Original concerned a dispute over the boundary, and not interpretation of Article VII of the 1905 Compact, so the primary focus of the evidentiary record compiled in that case concerned the chain of Delaware's title dating back to 1682. Accordingly, there is no reason to think the parties would have focused on the drafting history of the 1905 Compact to compile anything approaching a complete record on that issue. Delaware believes that the parties should be able to uncover more relevant evidence on the drafting history of the 1905 Compact through further investigation directed to that specific issue.

rights in the Delaware River, which New Jersey had commenced by filing suit against Delaware in this Court in 1877 following a fishing dispute that had arisen in 1871. *See* NJ Pet. ¶¶ 7-8; NJ Br. 5-6. The positions taken by the States in No. 1, Original may therefore provide an important context for interpreting the 1905 Compact. Indeed, Delaware only recently learned that New Jersey in that case appeared to be claiming only concurrent jurisdiction within the twelve-mile circle – a claim that is inconsistent with its current, far-reaching claim that the 1905 Compact settling that dispute gave New Jersey exclusive jurisdiction.

A special master would be well-positioned to weigh the parties' competing factual claims based on the drafting context provided by No. 1, Original and to recommend findings of fact for this Court's consideration. In any case, Delaware has been able to perform only a limited review of the record in that case currently available to it and is still attempting to obtain the entire record. Moreover, it is Delaware's understanding from this Court's library that substantial portions of the record in that case are missing. Delaware is currently pursuing other avenues of obtaining copies of that record but has not yet been successful in finding it.

Legal Context of the 1905 Compact. Another critical element of this case is the state of the law of waters and of riparian rights as the drafters would have understood them in the years leading up to 1905. While Delaware was able to investigate that subject to some degree in its brief in opposition to New Jersey's Motion To Reopen and for a Supplemental Decree, this case would benefit from additional research and investigation. In addition, the Court might benefit from the opinions of expert witnesses on water law, and a special master would be best situated to manage the development of those expert opinions.

Parties' Course of Conduct from 1905 to the Present. The parties have adduced some evidence of their respective courses of conduct in purporting to regulate

structures and activities carried out on Delaware's subaqueous soil. Formal discovery is necessary, however, to ensure that all relevant evidence is found and analyzed – tasks well-suited to the fact-finding function of a special master. Although the parties have exchanged some documents pursuant to informal discovery and briefed the course of conduct issue to an extent in their prior submissions, Delaware believes there is more to discover. In addition to independent investigations and deeper searches of state files, it will almost certainly be necessary for Delaware to undertake third-party discovery to obtain a fuller record than is available solely from state archival materials. New Jersey's initial filing also contained multiple assertions of its exercise of riparian jurisdiction based on New Jersey laws dating back to 1851. *See* NJ Br. 8-10. Delaware would seek to take discovery and to investigate further the accuracy and completeness of those assertions.[3]

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[3] Although New Jersey has claimed that the record in No. 11, Original is complete on that score through 1933, *see* NJ Reply 28-29, that should not preclude further investigation into events from those years. No. 11, Original focused on the boundary dispute, not on how the parties performed under the 1905 Compact. Thus, while the parties did adduce some evidence of riparian acts, it was for the purpose of adjudicating New Jersey's claim of prescription (which this Court rejected) and not for interpreting the "riparian jurisdiction" language in Article VII of the 1905 Compact. *See New Jersey v. Delaware*, 291 U.S. at 375-77. Accordingly, there could well be additional evidence from those years uniquely relevant to the current dispute but omitted from the record of the boundary dispute. New Jersey also contends that evidence of course of performance for the years after 1933 is not necessary because the evidence submitted by New Jersey in its current filings "demonstrates that there is nothing of consequence in Delaware's favor that could materially change the conclusion" New Jersey seeks to have this Court draw. NJ Reply 29. The evidentiary record, however, plainly cannot be limited to what New Jersey submitted as part of its own advocacy. Rather, Delaware deserves its day in court and to have this case decided on a full evidentiary record. Given the significance of this Court's resolution of this dispute for the States' conduct well into the future, Delaware's position is that this case should be decided based on all of the relevant historical facts.

Status and Scope of BP's Proposed Project. Delaware will also seek discovery on the extent of BP's proposed project, which appears to present a moving target. For example, while New Jersey's affiant in this case has reported that BP's proposed facility would require 800,000 cubic yards of Delaware's subaqueous soil to be dredged from the riverbed, *see, e.g.*, NJ App. 135a (Segal Aff. ¶ 4), more recent filings by BP with the Federal Energy Regulatory Commission ("FERC") have increased that already enormous dredging estimate *by more than 50%*, to 1.24 million cubic yards. *See* Berth Design Revision at 1-2, Docket No. CP04-411-000 (FERC filed Dec. 1, 2005). As this example illustrates, discovery is necessary to reveal the true nature and scope of BP's LNG facility and the activities proposed to be conducted within Delaware. Such discovery is important to the legal claims of New Jersey because the BP project dwarfs anything that might have been contemplated by the parties at the time the 1905 Compact was being drafted and ratified.

It would be particularly unfair to Delaware to treat this long-standing dispute between the two States as suitable for resolution without further factual and legal development. Each of the prior original actions brought by New Jersey has involved extensive work between the two parties so that the Court could achieve a just resolution of the issues. Given the long span of time in which boundary-related disputes have arisen between the two States, New Jersey simply cannot justify its request to bypass this Court's normal process for resolving a controversy of this type. The only entity that would benefit from such speedy treatment is BP, and this Court has never allowed the short-term commercial interests of a corporation to dictate the manner in which it resolves a historic dispute between two States.

Conclusion

For the foregoing reasons, the Court should grant Delaware's motion for appointment of a special master.

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December 28, 2005

No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Bill of Complaint and Motion for Appointment of Special Master

REPLY IN SUPPORT OF MOTION FOR APPOINTMENT OF SPECIAL MASTER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT:

I. THIS DISPUTE IS ONLY PART OF A LONG-RUNNING DISAGREEMENT BETWEEN THE STATES THAT MUST BE UNDERSTOOD IN ITS PROPER HISTORICAL CONTEXT 2

II. PROPER RESOLUTION OF THIS CASE REQUIRES FURTHER FACTUAL INVESTIGATION, WHICH DELAWARE SHOULD BE PERMITTED TO CONDUCT UNDER THE SUPERVISION OF A SPECIAL MASTER 3

III. THIS COURT'S CASES FAVOR APPOINTMENT OF A SPECIAL MASTER 14

IV. THE COURT'S USE OF A SPECIAL MASTER IN *VIRGINIA V. MARYLAND* SUPPORTS THE APPOINTMENT OF A SPECIAL MASTER HERE 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Ampro Fisheries, Inc. v. Yaskin:

588 A.2d 879 (N.J. Super. Ct. App. Div. 1991), *aff'd in part and rev'd in part*, 606 A.2d 1099 (N.J. 1992) 10-11

606 A.2d 1099 (N.J. 1992) 11

California v. United States, 457 U.S. 273 (1982) 17

Crow Tribe of Indians v. Racicot, 87 F.3d 1039 (9th Cir. 1996) 8

Cuyler v. Adams, 449 U.S. 433 (1981) 5

Edwards v. Aguillard, 482 U.S. 578 (1987) 8

Idaho v. United States, 533 U.S. 262 (2001) 8

Kansas v. Colorado:

533 U.S. 1 (2001) 7

543 U.S. 86 (2004) 14

Keebler Co. v. Murray Baking Products, 866 F.2d 1386 (Fed. Cir. 1989) 17

Nebraska v. Wyoming, 507 U.S. 584 (1993) 17

New Hampshire v. Maine, 532 U.S. 742 (2001) 15, 16

New Jersey v. Delaware, 291 U.S. 361 (1934) 2

New Jersey v. New York, 523 U.S. 767 (1998) 15

New Mexico v. General Elec. Co., 335 F. Supp. 2d 1266 (D.N.M. 2004) 7

Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92 (1st Cir. 1997) 8

Ohio v. Kentucky:

410 U.S. 641 (1973) 16

444 U.S. 335 (1980) 16

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 4, 5

Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988) 8

State v. Mick, et al., Crim. Nos. 83-05-0092-93, *et al.* (Del. Super. Ct. May 2, 1984) 11

United States v. Alaska, 503 U.S. 569 (1992) 16

United States v. Texas, 339 U.S. 707 (1950) 15

Virginia v. Maryland, 540 U.S. 56 (2003) 14-15, 17, 18, 19, 20, 21

Virginia v. West Virginia, 238 U.S. 202 (1915) 12

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 11

Williams v. Standard Oil Co., 278 U.S. 235 (1929) 11

CONSTITUTION, STATUTES, AND RULES

U.S. Const. art. I, § 10, cl. 3 (Compact Clause) 18

Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact).....13

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 Delaware-New Jersey Compact) .....*passim*

1785 Virginia-Maryland Compact, 1785-86 Md. Laws ch. 1, 1785 Va. Acts ch. 17 .....18, 20

Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.*.....21

Fed. R. Civ. P. 26(b)(1).....5

ADMINISTRATIVE MATERIALS

Letter from Peter C. Harvey, New Jersey Attorney General, to Ryan P. Newell, Connolly Bove Lodge & Hutz LLP (Nov. 30, 2005) 13

OTHER MATERIALS

Oral Arg. Tr., *Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915 (Oct. 7, 2003) 21

Report of the Special Master, *New Jersey v. New York*, No. 120, Orig., 1997 WL 291594 (filed Mar. 31, 1997).....4

Report of the Special Master, *Virginia v. Maryland*, No. 129, Orig. (filed Dec. 9, 2002), *available at* www.oag.state.va.us/PDF files/master Report.pdf 18, 20

The Federalist No. 43 (James Madison) (C. Rossiter ed., 1961) 11

U.S. Br., *New Hampshire v. Maine*, No. 130, Orig. (filed Dec. 19, 2000) 16

29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* (1997) 7

REPLY IN SUPPORT OF MOTION FOR APPOINTMENT OF SPECIAL MASTER

New Jersey claims the right to authorize BP p.l.c. ("BP") to construct a massive liquefied natural gas ("LNG") unloading facility on land that this Court has ruled is Delaware's, despite the fact that such construction – and the dredging necessary to permit the passage of supertanker ships the size of two football fields – undisputedly is prohibited by Delaware's uniform regulation of its coastal areas. New Jersey's claimed right to unfettered jurisdiction over Delaware's sovereign lands and to override Delaware's long-standing regulatory authority is based on an erroneous and ahistorical reading of the 1905 Compact between the two States.

Rather than consent to the appointment of a special master, a routine practice in this Court's original cases, New Jersey requests that the Court resolve this centuries-old dispute between the States this Term without any additional fact-finding, additional briefing on the merits, or consideration of the unique factual and legal issues presented first to a special master to aid in this Court's ultimate consideration of the merits. To justify its request, New Jersey disavows the notion that the only entity that benefits from such expedited treatment is BP, but New Jersey offers no excuse for denying Delaware its right to prepare and mount a defense or for departing from this Court's normal mode of resolving such controversies between two States. *See* Brief in Opposition to Delaware's Motion for Appointment of Special Master at 12 (filed Jan. 4, 2006) ("NJ Opp. Mot."). Because the reasons proffered by New Jersey are unpersuasive, this Court should appoint a special master.

I. THIS DISPUTE IS ONLY PART OF A LONG-RUNNING DISAGREEMENT BETWEEN THE STATES THAT MUST BE UNDERSTOOD IN ITS PROPER HISTORICAL CONTEXT

The 1905 Compact at issue in this case was directed primarily to fishing rights and was executed in the shadow of a long-standing boundary dispute between New Jersey and Delaware that the Compact did not resolve. Instead, this Court finally adjudicated the boundary dispute in 1934 with the help of a detailed special master's report. The Court addressed the meaning of the 1905 Compact only in rejecting New Jersey's claim that the Compact had resolved the boundary dispute in New Jersey's favor as "an argument wholly without force." *New Jersey v. Delaware*, 291 U.S. 361, 377 (1934). But the Court did not interpret the scope of Article VII of the Compact, which pertains to "riparian jurisdiction" – a term that in the contemporary legal landscape of 1905 was rarely, if ever, used and certainly was not a phrase with an accepted legal meaning.

In this action, New Jersey asserts that it has "exclusive riparian jurisdiction" over Delaware's submerged lands that abut the New Jersey shoreline within the twelve-mile circle, notwithstanding the absence of the word "exclusive" in Article VII of the 1905 Compact. To support its interpretive theory, before filing this action New Jersey spent considerable time compiling a selective evidentiary filing totaling nearly 300 pages, in addition to its detailed Petition for Supplemental Decree and Brief in Support of its Motion To Reopen and for a Supplemental Decree (filed July 28, 2005) ("NJ Br."). That New Jersey chose to initiate this litigation with what functionally was a motion for summary judgment and supporting evidence, however, does not justify bypassing this Court's normal processes in original actions – namely, the appointment of a special master.

As New Jersey acknowledges, "the matters in controversy are grave and important." *Id.* at 19. New Jersey

seeks to deprive Delaware of all jurisdiction to regulate the placement of massive bulk transfer facilities and heavy industry in a substantial part of Delaware's own territory. New Jersey has not met its heavy burden to show that time is of the essence such that Delaware should be deprived of the fair opportunity to prepare and present its case – one that any defendant has in even the most mundane federal lawsuit. Indeed, the only entity that would benefit from such expedited treatment is BP, the private entity seeking to construct the massive LNG unloading facility that would extend nearly half a mile into Delaware territory and would require the dredging of 1.24 million cubic yards of Delaware's subaqueous soil.

As Delaware has shown, however, there are ample reasons to permit the parties to continue both discovery and independent investigation of the relevant facts and law. *See* Motion for Appointment of Special Master (filed Dec. 28, 2005) ("DE Mot."). The stakes are high, as the Court's decision will likely establish for all time the jurisdiction that each State may exercise over a substantial portion of what this Court has already determined to be Delaware's sovereign territory. While Delaware shares the goal of resolving this dispute in an efficient manner, Delaware must be accorded a fair opportunity for adequate investigation of the relevant facts and historical legal principles that are essential to resolving this case. A special master should be appointed to oversee the development of the necessary record for this Court's decision.

II. PROPER RESOLUTION OF THIS CASE REQUIRES FURTHER FACTUAL INVESTIGATION, WHICH DELAWARE SHOULD BE PERMITTED TO CONDUCT UNDER THE SUPERVISION OF A SPECIAL MASTER

In its motion to appoint a special master, Delaware identified five topics on which further discovery should be taken and a fair opportunity for independent investigation accorded. *See* DE Mot. 4-9. New Jersey takes issue with those topics, but its arguments for opposing further

factual development have no merit. New Jersey's argument that Delaware should be denied a fair opportunity to discover extrinsic evidence helpful to its case is also belied by New Jersey's own reliance on the voluminous extrinsic evidence it has submitted on its own behalf.

Drafting History of the 1905 Compact. Delaware will continue seeking and expects to find additional documents, including early drafts of the 1905 Compact, correspondence between the participants in either the negotiation or adoption of the Compact, and records or accounts of public proceedings, either in state archives or in the personal papers of those involved that have been given to historical museums or other archives. Similar evidence was considered by the special master in the recent case that New Jersey brought against New York. *See* Report of the Special Master, *New Jersey v. New York*, No. 120, Orig., 1997 WL 291594, at *15 (filed Mar. 31, 1997) (considering "extrinsic evidence . . . includ[ing] the original record in the 1829-30 *New Jersey v. New York* case; . . . precompact negotiations; pre-Compact and post-Compact related jurisprudence from this Court and the courts of both States; expert testimony; and written reports").

New Jersey relies on a narrow holding by this Court that a drafter's view if not communicated to either the other commissioners or relevant State officials would likely not be reliable evidence. *See* NJ Opp. Mot. 9 (citing *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.6 (1991)). Delaware's discovery and investigation would not be thus limited. Delaware does not seek uncommunicated views of a drafter, but rather is searching for actual drafts of the 1905 Compact traded between the parties, correspondence between the commissioners and state governments, records of any public proceedings concerning the Compact, and the like. This Court has explained (in the same case on which New Jersey relies) that such evidence of a compact's negotiation history not only is admissible but can be highly relevant to determining the compact's meaning:

> We agree with the Master that it is appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret Article IV. We previously have pointed out that a congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. Furthermore, we have on occasion looked to evidence regarding the negotiating history of other interstate compacts. Thus, resort to extrinsic evidence of the compact negotiations in this case is *entirely appropriate*.

Oklahoma v. New Mexico, 501 U.S. at 235 n.5 (emphasis added; internal citations omitted); *see also Cuyler v. Adams*, 449 U.S. 433, 447-48 (1981) (relying on compact drafters' comments on early drafts).[1]

As a matter of fundamental fairness, New Jersey cannot deprive Delaware of a full opportunity to gather its own evidence as to the drafting history of the 1905 Compact (as well as other relevant issues) in response to the evidence gathered by New Jersey. New Jersey argues unpersuasively that its plain-meaning reading of the 1905 Compact is dispositive. *See* NJ Opp. Mot. 8-9. That assertion is belied by New Jersey's repeated reliance on its own extrinsic evidence relating to the meaning of the Compact (NJ Br. 7; NJ Reply 2-3, 20[2]) and by New Jersey's acknowledgment that the Court may consider evidence beyond the four corners of the 1905 Compact if it finds that the Compact is not unambiguous. New Jersey's plain-meaning argument rests fundamentally on its claim that the Article VII phrase "may . . . continue" was in-

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[1] Even evidence that is not admissible at trial is still discoverable so long as the discovery is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

[2] Reply Brief and Supplemental Appendix in Support of Motion To Reopen and for a Supplemental Decree (filed Nov. 8, 2005) ("NJ Reply").

tended to convey new rights, and that the word "exclusive" should be impliedly read into Article VII's description of "riparian jurisdiction." NJ Opp. Mot. 11. Delaware disputes that the parties expressly or impliedly intended the allegedly plain meanings that New Jersey ascribes to those terms. Thus, New Jersey's plain-language argument quickly devolves into a discussion of history, practice, custom, and intent that rests on an evidentiary presentation. A special master would be uniquely situated to facilitate the parties' efforts to narrow the grounds for dispute on those matters.

The course of informal discovery between the parties on the expedited basis presented thus far demonstrates the need for more development of the factual record on the course of negotiations and drafting history of the 1905 Compact, among other issues.[3] New Jersey acknowledges that Delaware sought documents pertaining to the negotiation of the 1905 Compact. *See* NJ Opp. Mot. 7 & App. 5a. In discussions among counsel for each State over Delaware's discovery requests, New Jersey's representative suggested that Delaware conduct its own archival searches for documents in possession of the State of New Jersey. Delaware took that suggestion to mean that New Jersey itself had not conducted a comprehensive search of its state archives in response to Delaware's request for such documents. Indeed, New Jersey does not represent that it conducted a search of its own archives for responsive materials, but rather suggests that Delaware should be satisfied with the "principal documents" collected in

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[3] New Jersey argues that Delaware's discovery should be limited to its initial August 25, 2005 document request and a subsequent verbal request regarding any documents that New Jersey has relating to the 1877 case between the States, No. 1, Original. *See* NJ Opp. Mot. 6-7. At that time, Delaware was attempting to meet a deadline to file its papers in response to New Jersey's voluminous July 28, 2005 filings. Delaware never envisioned its single informal request as exhaustive, and Delaware further understood that New Jersey's production was limited in scope, as New Jersey did not search all files in its custody or control.

No. 11, Original, and a few other public documents. *See* NJ Opp. 8-9. But because the issues presented by New Jersey's current complaint raise issues that are different from those that have been litigated before between the two States, it is appropriate to afford both parties an adequate opportunity to search relevant archives for materials that would assist the Court in resolving the current dispute.[4]

Legal Context of the 1905 Compact. Delaware seeks fact-finding on the state of the law of waters and riparian rights as the drafters would have understood them in the years leading up to 1905, both via its own independent investigation and legal research and also by expert witnesses on water law. *See, e.g., Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring and dissenting in part) ("A compact is a contract. . . . It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made.").

In view of the arcane and specialized nature of riparian law, and the fact that the relevant legal context is at least a century old, testimony by experts in water law or water rights could be helpful to the Court in determining the legal context in which this dispute must be assessed. *See, e.g., New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1266, 1305-06 (D.N.M. 2004) (finding law professor's expert testimony about the legal administrative history of the Rio Grande River and the Middle Rio Grande Basin, and the effect of the Rio Grande compact, admissible as "background or context for the determination of the pertinent factual issues"); 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6264, at 217-22 & n.36 (1997) ("The courts seem more open to the admission of expert legal opinions where the subject is the applica-

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[4] Delaware's searches of New Jersey's state archives are ongoing. Due to the age of the sought-after documents, such searches are both laborious and time-consuming.

tion of some complex regulatory or legal standard to a specific factual background.").

Moreover, Delaware anticipates that a water law expert would offer testimony that would inform the Court on the historical development of water law as it existed when the 1905 Compact was negotiated. Such testimony is more akin to a historical expert on legal developments. New Jersey itself submitted an affidavit purporting to set forth the historical facts of New Jersey's regulation of riparian rights in 1905. *See* NJ Br. App. 26a-28a ("Riparian Rights in New Jersey in 1905 and Today"). Delaware's request is no different in kind than the evidence New Jersey developed on its own pre-filing timetable. *See also Idaho v. United States*, 533 U.S. 262, 266 (2001) (relying on expert witness historian's account of late nineteenth century reliance by Coeur d'Alene Tribe on submerged lands under lake).[5]

The evidence Delaware seeks to develop would not in any case be limited to reports and testimony of experts but could also involve the submission of learned treatises and other materials. Delaware should be afforded time to explore these issues further, to consult expert legal historians, and to present its own evidence on issues relating to the development of the law of waters as it relates to the

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[5] The cases relied on by New Jersey (*see* Opp. Mot. 9-10) are inapposite and do not support barring expert evidence on the historical evolution and contemporary legal context of the law of waters. In *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987), the Court agreed with the lower court's exclusion of expert opinions as to a state legislature's purpose in enacting a statute. Here, Delaware seeks only to establish the state of water law in 1905 in aid of the Court's contextual interpretation of the words of the 1905 Compact. *See also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100-01 (1st Cir. 1997) (barring testimony on legal issues "routinely before the federal courts [and] . . . not complex," while noting that "there may be particular areas of law . . . where expert testimony on legal matters is admissible"); *Cron Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (excluding expert testimony on meaning of "lottery games" in a 1993 gaming compact); *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988) (excluding legal conclusions as to whether there had been a "search" of plaintiffs' residence).

use of the term "riparian jurisdiction" in the 1905 Compact. A special master would be best positioned to oversee the development of the historical record on the state of riparian law, to resolve any disputes in the first instance before such arguments are presented to this Court, and to make recommendations to this Court on how issues in the case should be resolved.

Tellingly, New Jersey does not dispute (because it does not address) the relevance of the state of riparian law and rights at the turn of the twentieth century. Instead, New Jersey attacks a straw man, pretending that Delaware seeks to have this Court "defer to the legal opinions offered by a party's 'expert' on the proper interpretation of a statute or the contours of American law." NJ Opp. Mot. 9. The evidence that Delaware seeks to develop and present concerns the historical facts underlying the legal background against which the terms of the 1905 Compact were drafted, which is necessary to the proper interpretation of that document.

Parties' Course of Conduct from 1905 to the Present. In its motion, Delaware pointed out the need to take discovery, including third-party discovery, of the States' course of conduct after adoption of the 1905 Compact. *See* DE Mot. 8. In opposition, New Jersey contends that Delaware should be limited to the evidence presented in No. 11, Original, such as certain "instruments that were recorded" in New Jersey's files, and Delaware's inspection of boxes produced by New Jersey in response to Delaware's initial, informal request for discovery dated August 25, 2005. NJ Opp. Mot. 10.

New Jersey, however, has relied on documents written by or on behalf of third parties, such as E.I. DuPont de Nemours & Co. ("DuPont"), in an effort to show a course of conduct consistent with New Jersey's construction of the 1905 Compact. *See* NJ Br. 32-33; *id.*, App. 102a-104a, 111a-117a. Delaware should also have an opportunity to take discovery of the third parties identified in its initial, informal August 25, 2005 discovery requests, including

DuPont, Keystone Cogeneration Systems Inc., and El Paso Eastern Company. These entities also may have evidence relevant to the States' course of conduct under the Compact that would shed light on why for several decades New Jersey acquiesced to Delaware's regulation of structures adjoining the New Jersey shore and extending into Delaware. Delaware has already commenced these third-party discovery efforts informally. A special master would facilitate the parties' efforts to obtain third-party discovery and resolve any discovery disputes that might arise between the parties themselves and between the parties and third parties.

Other course-of-performance evidence is especially relevant to Delaware's eighth affirmative defense, which asserts that New Jersey's claims are barred by the doctrines of inseverability and unenforceability. *See* Answer of State of Delaware at 12 (filed Dec. 28, 2005). The States failed to effectuate the central provision of the 1905 Compact, Article IV, which was intended to resolve the States' disputes over fishing rights and arrests on the waters through the adoption of "uniform laws to regulate the catching and taking of fish in the Delaware River and Bay." NJ Br. App. 4a; *see* DE Lodging, Tab 7, at 10 (filed Oct. 27, 2005) (Statement of Reasons) (the "main purpose" of the 1905 Compact is "to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware River and Bay").

In 1991, according to one New Jersey court, New Jersey itself argued that "'the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws.'" Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree at 7 n.1 (filed Oct. 27, 2005) ("DE Opp.") (quoting *Ampro Fisheries, Inc. v. Yaskin*, 588 A.2d 879, 883 (N.J. Super. Ct. App. Div. 1991), *aff'd in part and rev'd in part on other*

grounds, 606 A.2d 1099 (N.J. 1992)).[6] A Delaware court has similarly concluded that, "[b]ecause no uniform laws ever existed in 1907, nor since, the Delaware General Assembly has never been bound by any of the provisions of the compact." App., *infra*, 6a (*State v. Mick, et al.*, Crim. Nos. 83-05-0092-93, *et al.*, slip op. at 2 (Del. Super. Ct. May 2, 1984)).

Under principles of inseverability, the States' failure to effectuate Article IV may render the entire 1905 Compact unenforceable. *See, e.g., Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42 (1929) ("[T]he general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.") (internal quotation marks omitted); *The Federalist* No. 43, at 247 (James Madison) (C. Rossiter ed., 1961) ("A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void.").

In light of the parties' failure to effectuate Article IV, Delaware should be permitted full discovery of evidence relating to the parties' conduct in that regard following 1905, as well as the significance of Article IV generally to

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[6] The New Jersey Superior Court, Appellate Division, concluded that the 1905 Compact preempted any unilateral action by the State of New Jersey; but the New Jersey Supreme Court reversed, holding that Article IV did not require the adoption of uniform fishing laws. *See* 606 A.2d at 1103. Regardless, no state court decision can provide a controlling interpretation of the Compact. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

the parties' intent in forming the Compact. Those facts bear on whether New Jersey would have any authority to enforce Article VII even if the Court were to accept its reading of the Compact.

Status and Scope of BP's Proposed Project. In light of the recent enormous increase in the scope of BP's project in terms of its dredging of Delaware's subaqueous soil (*see* DE Mot. 9), Delaware also seeks further discovery into the extent of BP's project. New Jersey erroneously claims that this issue relates solely to whether the project "is in the public interest" as determined by the "responsible federal agencies, and New Jersey, if it prevails." NJ Opp. Mot. 11. Rather, the nature and scope of the project directly relates to whether, under the 1905 Compact, Delaware expressly conveyed to New Jersey the expansive authority that New Jersey now claims or whether, as Delaware contends, the facility is far beyond anything envisioned by the Compact, even on New Jersey's interpretation. Because "riparian jurisdiction" does not appear to have a settled meaning, whether or not a project such as BP's is reasonably encompassed within the Compact's terms is an important issue. *See Virginia v. West Virginia*, 238 U.S. 202, 233 (1915) (questions of contract interpretation may be resolved by "determination of the fair intendment of the contract itself"). New Jersey's contention that Delaware is "already fully informed" also ignores that the facts about BP's project appear to be changing on a regular basis.

New Jersey v. Delaware, No. 1, Original, filed 1877. New Jersey claims (Opp. Mot. 6-7) that Delaware has had "ample" time to compile the record in No. 1, Original, but it does not contest the crucial fact that substantial portions of the record are missing from the Court's library. Nor does New Jersey assert that it has a complete record of that case. New Jersey instead refers to an incomplete set of documents from No. 1, Original, that it sent to Delaware only six days before Delaware's brief in opposi-

tion to New Jersey's motion to reopen was due. *See id.* at 7; *id.*, Ex. A, Supp. App. 8a-9a.

By letter dated November 30, 2005, New Jersey effectively conceded that its records were incomplete by requesting that Delaware "kindly forward to us any documents on behalf of Delaware in New Jersey v. Delaware I." App., *infra*, 4a (Letter from Peter C. Harvey, New Jersey Attorney General, to Ryan P. Newell, Connolly Bove Lodge & Hutz LLP (Nov. 30, 2005)). In light of the historic nature and importance of this dispute, Delaware should be permitted to continue to search for the complete record of No. 1, Original, which informed the drafters' understanding of the issues to be addressed as they negotiated a settlement of that case through the 1905 Compact. Indeed, as Delaware has noted, New Jersey currently asserts a far more extensive scope of jurisdiction under the 1905 Compact than it did in the litigation that the Compact resolved. *See* DE Mot. 7. Delaware should be permitted to explore further the extent to which New Jersey's changing positions should inform the meaning of the 1905 Compact.

New Jersey's Interpretation of the 1905 Compact Suffers From Significant Flaws. As Delaware has pointed out (*see generally* Opp. 35-75), New Jersey's reading requires engrafting the word "exclusive" onto Article VII when in fact the commissioners – who used that term elsewhere in the 1905 Compact – avoided it with respect to Article VII. And, while the commissioners incorporated verbatim other language from New Jersey's 1834 Compact with New York, New Jersey's commissioners did not propose – or were unable to obtain – language that would have granted New Jersey "exclusive" jurisdiction of the nature sought by New Jersey here.

New Jersey's reading of Article VII is likewise inconsistent both with the 1905 Compact as a whole and with the extrinsic evidence found thus far. The key provisions of the Compact, in Articles I through V, were intended to resolve the disputes over fishing rights and arrests on the

water that had caused the litigation that the parties sought to settle. *See* NJ Br. App. 2a-5a. Article VI makes clear that the Compact does not grant rights affecting the oyster industry. *See id.* at 5a. Article VII similarly permits each State to "continue to exercise riparian jurisdiction" "on its own side of the river" without expressly conveying new rights on the other side of the territorial boundary between the States. *Id.* Article VIII then reserves Delaware's right to vindicate its claim to full sovereignty up to the low-water mark on the New Jersey shore, thus determining the line separating each State's "own side of the river" for purposes of Article VII. *Id.*

Finally, even if Article VII could be construed as an express relinquishment of Delaware sovereignty, New Jersey's expansive assertion of "exclusive riparian jurisdiction" fails because it mistakes a reference to a narrow type of jurisdiction, "riparian jurisdiction," for a broad grant of exclusive sovereignty over any issue related in any way to a riparian right.

Full discovery should be permitted, under the guidance of a special master, on these and other important issues that may arise in the course of litigation. To the extent New Jersey is concerned about needless delay or expenses, a special master would be fully empowered to streamline the proceeding and avoid any waste or delay, while at the same time granting Delaware full and fair discovery, as well as an adequate opportunity to search public and private archives, museums, private collections, corporate records, and other sources for relevant documents in this historic dispute.

III. THIS COURT'S CASES FAVOR APPOINTMENT OF A SPECIAL MASTER

As New Jersey acknowledges, "it is true that the Court frequently appoints a special master in original actions." NJ Opp. Mot. 2. New Jersey thus concedes it is the norm, and in fact this Court has appointed a special master in an overwhelming majority of original actions. *See, e.g.*, *Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Mary-*

land, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); DE Mot. 5. New Jersey nevertheless opposes the appointment of a special master, relying first on two inapposite cases in which this Court has declined to appoint one. *See* NJ Opp. Mot. 2-3.

In *United States v. Texas*, 339 U.S. 707 (1950), the Court applied its own controlling precedent on the "equal footing" doctrine to determine the scope of Texas's sovereignty over coastal waters upon its admission as a State of the Union. *See* NJ Opp. Mot. 2 ("the Court had decided similar cases in favor of the United States").[7] The equal-footing doctrine has no applicability here, however, and there is no controlling precedent to apply because this Court has not interpreted the relevant provisions of the 1905 Compact.

Moreover, the Court in *United States v. Texas* made clear that, "[i]f there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential." 339 U.S. at 715. That reasoning supports appointment of a special master here, because interpretation of the 1905 Compact will be informed by "contemporary construction" and "usage" of the terms the drafters used pertaining to riparian laws and rights. *See id.* ("The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.").

In the other case on which New Jersey relies, the Court resolved a boundary dispute based on judicial estoppel without appointing a special master. *See New Hampshire v. Maine*, 532 U.S. 742 (2001). But that resolution came

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[7] The Court explained that the "equal footing clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded . . . . There is no need to take evidence to establish that meaning of equal footing." *United States v. Texas*, 339 U.S. at 715-20.

about from a recommendation of the United States that this Court's precedent would resolve the issue in such an efficient manner. *See* U.S. Br. at 14-15, No. 130, Orig. (filed Dec. 19, 2000). As Delaware has explained, that doctrine is inapplicable here for multiple reasons – the most significant being that this Court never relied on the statements of Delaware's outside counsel in the boundary case on which New Jersey relies and which New Jersey in any event misinterprets. *See* DE Opp. 68-72 & n.38.[8] New Jersey did not attempt to refute Delaware's arguments on this issue in its subsequent reply brief. *See* NJ Reply 23.[9]

New Jersey next concedes that its original filing was functionally a motion for summary judgment and asserts that "New Jersey's request for relief, like a case for summary judgment, presents no disputes of material fact and can be resolved as a matter of law." NJ Opp. Mot. 4. Although New Jersey claims that "[s]ummary judgment motions are proper and not uncommon in original action cases," *id.*, it fails to cite a single case for the proposition that summary judgment is proper where the opportunity for discovery and independent investigation of facts has been denied. In *United States v. Alaska*, 503 U.S. 569 (1992), the dispute turned on the proper interpretation of a federal statute and the administering agency's construction of it, issues that rarely, if ever, would require factual

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[8] New Jersey's original filing did not mention judicial estoppel or cite *New Hampshire v. Maine*, but rather relied on the statements as course-of-performance evidence of the meaning of the 1905 Compact. *See* NJ Br. 27-30. Delaware fully refuted New Jersey's reading and, in an abundance of caution, explained why any claim of judicial estoppel would fail as well.

[9] New Jersey also cites *Ohio v. Kentucky*, 410 U.S. 641 (1973), *see* NJ Opp. Mot. 1-2, but in that case the Court *had* appointed a special master. *See* 410 U.S. at 643-44 *id.* at 652 (rejecting proposed amended complaint based on 150-year-old controlling precedents and "remand[ing] to the Special Master for further proceedings" on allegations in original complaint); *opinion following remand*, 444 U.S. 335, 337 (1980) ("We agree with the special master.").

development. Likewise, *California v. United States*, 457 U.S. 273, 278 (1982), involved a narrow "choice-of-law issue," as to which this Court found that "[n]o essential facts [were] in dispute." And in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), the Court resolved a water-rights dispute on cross-motions for summary judgment by interpreting an equitable apportionment decree that it had issued in 1945; but it did so only after full discovery, and the Court found the report of the special master to be of substantial assistance in its consideration and disposition of that case. *See id.* at 593 ("To the extent that we agree with the Master, we have found it unnecessary to repeat in detail his careful evaluation of the voluminous evidence.").[10] In any event, this case simply does not present the kinds of unusual circumstances in which this Court has exercised its discretion not to appoint a special master in resolving a dispute between two States.

IV. THE COURT'S USE OF A SPECIAL MASTER IN *VIRGINIA V. MARYLAND* SUPPORTS THE APPOINTMENT OF A SPECIAL MASTER HERE

New Jersey's claim that a special master is purportedly "unnecessary" because *Virginia v. Maryland*, 540 U.S. 56 (2003), provides sufficient "legal guidance" (NJ Opp. Mot. 13) fails to acknowledge that the Court afforded both States in that case a full opportunity to develop the record and employed the assistance of a special master. New Jersey's argument also ignores significant differences in the language of the 1905 Compact, the historical background surrounding the Compact, and the course of conduct between the States. Those issues thus raise factual

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[10] New Jersey also relies (Opp. Mot. 4-5) on *Keebler Co. v. Murray Baking Products*, 866 F.2d 1386 (Fed. Cir. 1989), but there the court affirmed an agency decision granting summary judgment and denying discovery where the non-movant asserted only that it sought "certain information and other evidence." *Id.* at 1389. Delaware's asserted need for the opportunity for discovery and independent investigation is much more specific and involves inquiry into century-old events. *See* DE Mot. 6-9; *supra* Part II.

and legal issues distinct from those considered in *Virginia v. Maryland*.

In *Virginia v. Maryland*, the Court had before it two interstate compacts, the 1785 Compact and the 1877 Black-Jenkins Award, that were approved by both States and by Congress pursuant to the Compact Clause. *See* 540 U.S. at 63. Moreover, the Black-Jenkins Award itself had expressly spoken to issues of "riparian ownership" under the 1785 Compact, and this Court also was able to consider the "reasoning contained in the Black-Jenkins opinion." *Id.* at 63, 71. Despite the availability of those legal sources, the Court still appointed a special master, who reviewed submission of 25 volumes of historical documents, correspondence, and secondary source material, as well as affidavits from experts on the history surrounding the 1785 Compact and the 1877 Black-Jenkins Award. After considering all of that evidence, the special master issued a 97-page report on December 9, 2002.[11]

Moreover, the special master's report aided the Court in several respects. First, the report narrowed the issues for presentation to the Court by limiting the consideration of the case to "Maryland's attempt to regulate construction in and water withdrawal from the Potomac by Virginia and its citizens." *Virginia v. Maryland*, Report at 10. The special master interpreted the 1785 Virginia-Maryland Compact and analyzed submissions relating to the historical review of the negotiation and events surrounding the adoption of the 1785 Compact. The special master also performed a thorough review of events and agreements that occurred subsequent to the adoption of the 1785 Compact (including the Black-Jenkins Award) and made recommendations relating to Maryland's prescrip-

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[11] *See* Report of the Special Master, *Virginia v. Maryland*, No. 129, Orig. (filed Dec. 9, 2002) ("*Virginia v. Maryland*, Report"). A copy of the special master's report in *Virginia v. Maryland*, which is unreported, can be found on the Virginia Attorney General's website, http://www.oag.state.va.us/PDF_files/master_Report.pdf

tion defense based upon a review of the evidence submitted.[12]

Delaware should be given the same opportunity to develop the facts relating to the issues raised in this case as the parties were afforded in *Virginia v. Maryland*, particularly because this case has no analog to the Black-Jenkins Award or the opinion supporting that award. Here, as discussed above, a special master would oversee the gathering of evidence relating to the drafting history of the 1905 Compact, which may be critical to resolving disputed issues of fact over the proper interpretation of the Compact. Moreover, a special master would review the legal context of the 1905 Compact and investigate the meaning of "riparian jurisdiction" as it existed at the time of the drafting of the Compact. The special master would make recommendations regarding the drafters' intent on Delaware's regulatory authority in light of the ongoing boundary dispute between the parties at the time of the adoption of the 1905 Compact and the unique provisions in the Compact that preserve the rights and jurisdiction of each State of, in, and over the Delaware River except as expressly set forth therein. The special master would review the parties' course of conduct after 1905 as that bears on the meaning of the Compact and any affirmative defenses, and assist the Court in reviewing the status and scope of BP's proposed project and whether New Jersey's assertion of exclusive jurisdiction over Delaware lands is improper.

Although the use of a special master in *Virginia v. Maryland* supports Delaware's request for similar treatment here, the decision in *Virginia v. Maryland* does not dictate the result in this case or address the unique factual, historical, and legal issues surrounding this dispute. Article VII of the 1905 Compact provides that each State may "continue to exercise" riparian jurisdiction on its "own side of the river." NJ Br. App. 5a. The 1905 Com-

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[12] All exceptions to the special master's report were overruled by this Court's final opinion. *See Virginia v. Maryland*, 540 U.S. at 79.

pact did not expressly grant the States the right to wharf out and for the States to have "full property in the shores . . . adjoining their lands," as the 1785 Compact provided. *See Virginia v. Maryland*, 540 U.S. at 62. The 1905 Compact also contains an express reservation of jurisdiction (Article VIII, *see* NJ Br. App. 5a) not contained within the 1785 Compact. In addition, the Court in *Virginia v. Maryland* interpreted the 1785 Compact in light of all the provisions thereof bearing on the issue of retained regulatory authority. *See* 540 U.S. at 66-67. The Court's interpretation of the 1785 Compact is not simply transferrable to the very different provisions of the 1905 Compact.

Another critical distinction between the *Virginia v. Maryland* case and this action is the scope of the relief sought. As the special master in *Virginia v. Maryland* stated in his report:

> This case is limited to consideration of Maryland's attempt to regulate construction in and water withdrawal from the Potomac by Virginia and its citizens. That is all that either Virginia's Complaint or the factual context of this case puts in controversy. Whether Maryland has the right to regulate Virginia's other activities in and on improvements constructed by Virginia or its residents below the low-water mark on the Virginia shore through imposition and collection of taxes, enactment and enforcement of criminal laws or other general licensing laws relating to public safety, occupational safety, health, alcohol, gambling, hunting or fishing, or general entertainment licensing, including restaurant inspection, is not at issue in this litigation.

Virginia v. Maryland, Report at 10. Here, by contrast, New Jersey seeks far broader relief barring Delaware from exercising most if not all sovereignty relating to any structure linked to New Jersey's allegedly exclusive riparian jurisdiction. Even if Article VII of the 1905 Compact had granted New Jersey new rights relating to riparian

jurisdiction (and it did not), Article VII may not be read so expansively as to preclude Delaware from regulating based upon environmental, conservation, or police power concerns, including Delaware's denial of a permit to BP under its Coastal Zone Act. Delaware law would govern activities that occur on a structure within its territory, as Virginia conceded with respect to its dispute with Maryland.[13] Also, the massive intrusion onto Delaware territory planned by BP is far more significant than the water pipe at issue in *Virginia v. Maryland*.

CONCLUSION

For the foregoing reasons and those stated in Delaware's motion, the Court should grant Delaware's motion for appointment of a special master. If the Court declines to appoint a special master, however, Delaware respectfully requests that the Court set the matter for briefing in the normal course.[14]

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[13] Counsel for Virginia conceded at oral argument in the *Virginia v. Maryland* case that the right to wharf out does not include the right to conduct any activity. "Operating a casino on the pier would not be a riparian use, and that's why Virginia has not objected to a wide variety of activities by Maryland on its side of the line that don't go to whether Virginia has the right to build the riparian structure in the first place." Oral Arg. Tr. at 48, *Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915, at *48 (Oct. 7, 2003).

[14] While previously acknowledging that further briefing on the merits would be not only warranted but desirable (*see* NJ Reply 28 ("The Case Should Be Briefed And Argued This Term"); *id.* at 30 (requesting that the Court "set a briefing schedule")), New Jersey now requests that this matter simply "proceed to argument and decision this term," presumably on the existing briefs. NJ Opp. Mot. 18. Delaware strongly objects to the course newly proposed by New Jersey, which not only would deny Delaware a fair opportunity to gather evidence by both formal discovery and independent investigation, but also would exclude the evidence and legal materials Delaware has been able to compile since filing its opposition to New Jersey's initial filing.

Respectfully submitted.

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January 17, 2006

APPENDIX

TABLE OF CONTENTS

Page

Letter from M. Jane Brady, Delaware Attorney General, to Hon. William K. Suter, Clerk, United States Supreme Court (Aug. 4, 2005) 1a

Letter from Peter C. Harvey, New Jersey Attorney General, to Ryan P. Newell, Connolly Bove Lodge & Hutz LLP (Nov. 30, 2005) 4a

Letter Order, *State v. Mick, et al.*, Crim. Nos. 83-05-0092-93, *et al.* (Del. Super. Ct. May 2, 1984) 5a

[SEAL OMITTTED]

M. JANE BRADY
ATTORNEY GENERAL

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

[Addresses/Phone Numbers Omitted]

PLEASE REPLY TO: New Castle County

August 4, 2005

By Federal Express

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: The State of New Jersey v. The State of Delaware
Case No. 11, Original

Dear Mr. Suter:

This office represents the defendant, the State of Delaware, in the above matter. On behalf of the State of Delaware, we respectfully request an extension of 60 days to respond to Plaintiff's Motion to Reopen and for a Supplemental Decree ("Plaintiff's Motion") and its brief in support thereof. Plaintiff's Motion was docketed on August 1, 2005; consequently, the brief in opposition must currently be filed on or before August 11, 2005. For the reasons set forth below, the State of Delaware is respectfully requesting an extension until October 10, 2005, to file its opposing brief.

The State of Delaware is currently in the process of retaining Supreme Court counsel. In addition, due to certain scheduling conflicts related to upcoming vacations for outside counsel and key individuals employed by the State of Delaware, including potential affiants, counsel

will need additional time to prepare a response that adequately and properly addresses the legal and factual issues raised in Plaintiff's Motion and brief.

By way of background, the substantive issues related to the matters in dispute were only presented to the State of Delaware in one exchange of letters and brief telephone calls prior to this filing. Other than these cursory exchanges, there had been no other prior substantive discussions between the States of Delaware and New Jersey about the Compact of 1905 and the jurisdiction of Delaware and New Jersey. In fact, representatives of the State of Delaware were informed only days before Plaintiff's Motion was filed that the State of New Jersey was planning on filing such a Motion, and were unaware of the extent of the filing. Specifically, the State of Delaware was unaware that the State of New Jersey had requested and received permission to file a separate brief under Supreme Court Rule 21.1.

While there has been recent litigation in Delaware concerning permits to use Delaware's lands, that litigation did not involve the State of New Jersey or the Compact of 1905 between the States. Previously, Delaware's Department of Natural Resources and Environmental Control was involved in a dispute with Crown Landing LLC, a wholly owned subsidiary of British Petroleum, p.l.c., about whether Crown Landing LLC's proposed liquefied natural gas facility (which is located in Delaware waters) was a "permitted use" under Delaware's Coastal Zone Act. While the case was decided by the Coastal Zone Industrial Control Board (filed on February 15, 2005 and decided on April 8, 2005), that Board did not address any issues related to the Compact of 1905, and the Board's decision did not address issues related to riparian rights.

Moreover, the preparation of a response to Plaintiff's Motion and brief will require a significant amount of factual investigation. The State of New Jersey has submitted a brief that has seven affidavits, some with multiple

exhibits including historic documents covering the past 75 years. Given the threshold issues that exist about whether the Supreme Court should grant the motion, and the wide range of factual issues that the State of New Jersey has raised in its motion, the State of Delaware will need to do a detailed search of historic records. In addition, the State of Delaware may need to submit multiple affidavits supporting its position, and all of this would result in a significant hardship to accomplish those tasks in the very near future.

By copy of this letter, we are concurrently informing Plaintiff's counsel of our request. Thank you for your courtesy and prompt consideration of this request.

Very truly yours,

/s/ M. JANE BRADY

M. Jane Brady
Attorney General

MJB:mah

CC: Rachel J. Horowitz, Deputy Attorney General of New Jersey

[SEAL OMITTED]

RICHARD J. CODEY
Acting Governor

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November 30, 2005

Via Overnight Mail

Ryan P. Newell, Esq.
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange Street
PO Box 2207
Wilmington, Delaware 19801

Re: State of New Jersey v. State of Delaware

Dear Mr. Newell:

Enclosed please find a CD containing a cleaner version of the Record and Transcript of New Jersey v. Delaware I. The enclosed CD contains the three (3) volumes and Record.

Furthermore, kindly forward to us any documents on behalf of Delaware in New Jersey v. Delaware I.

Sincerely yours,

PETER C. HARVEY

ATTORNEY GENERAL
OF NEW JERSEY

By: */s/* JULIE K. GOLDMAN
Julie K. Goldman
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SUPERIOR COURT
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STATE OF DELAWARE

Claud L. Tease
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May 2, 1984

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Dover, DE 19901

RE: State v. Mick, Parsons, Crow and Willey
83-05-0092-93, 0094-95, 0081-0091
0071-0080, 1080, 2080, 3080, 1091,
2091, 3091

Gentlemen and Madam:

The parties do not dispute the fact that in 1905 Delaware and New Jersey entered into an interstate compact relating to disputes over territory, jurisdiction, and the taking and catching of fish in the Delaware River and Bay.

The compact authorized the passage of uniform laws by the states but did not require them to be passed.

In 1907, contrary to the position taken by defendants, the states did not enact uniform laws pursuant to the compact and this lack of uniformity is obvious from an examination of the pertinent provisions of the 1907 legislation.

Consequently, the various laws regulating the taking of fish, enacted by the Delaware General Assembly between 1907 and today, are valid and enforceable.

Aside from the obvious substantive differences in the content of the 1907 Delaware and New Jersey statutes, historians, individuals, organizations and legal advisors have consistently agreed over the years that the 1907 laws were not uniform in many important respects.

Since the provisions of Article IV of the compact, authorizing the states to pass uniform laws, were never put into effect, the states have been free to enact their own legislation regulating the fishing in the bay and ocean.

An excellent in-depth review of this question is found in the State's answering brief filed on September 7, 1983, pp. 16-35.

Defendant's argument relating to the 1915 Delaware Code "revisions" is without merit because the changes were simply proposed, and New Jersey had then, and has since had, its own statutes dealing with the taking of fish, different in substance from Delaware's.

Because no uniform laws ever existed in 1907, nor since, the Delaware General Assembly has never been bound by any of the provisions of the compact.

* * * * * *

Defendants challenge the pertinent statutes on the ground of vagueness and the consequent failure to give notice as to what type of conduct is prohibited. Such challenges must be examined in the light of the facts of the particular case at hand. U.S. v. Maguire, 419 U.S. 544 (1975); Upshur v. State, Del. Supr., 420 A.2d 165 (1980).

(There are no First Amendment rights raised by defendants.)

It is abundantly clear from the facts of record in these cases that defendants knew what type of conduct would be considered unlawful under 7 Del. C. §910 and 936.

* * * * * *

I find no inconsistencies in Chapter 9 of 7 Del. C. sufficient to support a constitutional attack on any of the sections of that chapter. When read and analyzed together they are reasonably clear and consistent.

A comprehensive resources management plan, whether put into effect by statute or regulation enacted pursuant to statute, is necessarily suspect and subject by its very nature to arguments relating to vagueness and inconsistency; but the administrators and the courts must be slow to throw them aside because of the importance of resources management to society, absent a clear showing of inconsistency.

* * * * *

The question raised by the parties regarding the duty of the Delaware General Assembly to modernize the fin fishing laws has been recently mooted. The duty of the courts, in most cases, is to interpret the law without regard to whether it comports with good public policy. And if a statute is antiquated or may produce a hardship to a special class of persons or may lead to an unwise result, it is for the legislative branch of government to act, not the judicial branch.

* * * * *

Defendants' non-enforcement argument has previously been disposed of by the Delaware Court of Chancery in Delaware Watermen's Assoc. v. DNREC, et al., C.A. 789 (1983), Kent County, Brown, Chancellor.

For the reasons set out herein the defendants' motions to dismiss must be, and they are hereby, denied.

Sincerely yours,

/s/ CLAUD L. TEASE
Claud L. Tease

CLT:Hf
cc: Prothonotary
Case Scheduling Office

No. 134, Original

In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

REPORT OF THE SPECIAL MASTER
APPENDICES

RALPH I. LANCASTER, JR.
Special Master

April 12, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

APPENDIX A: Proposed Decree A-1

APPENDIX B: Compact of 1905 ..... B-1

APPENDIX C: Joint Statement of Facts C-1

APPENDIX D: Order on New Jersey's Motion to Strike Proposed Issues of Fact D-1

APPENDIX E: New Jersey's Index of Evidentiary Materials E-1

APPENDIX F: Delaware's Index of Evidentiary Materials F-1

APPENDIX G: New Jersey's Proposed Decree G-1

APPENDIX H: Delaware's Proposed Form of Judgment H-1

APPENDIX I: Table of Actions by Delaware and New Jersey Reflecting an Assertion of Jurisdiction or Authority Over the Eastern Shore of the Delaware River I-1

APPENDIX J: Table Comparing Similar Provisions in the New Jersey-New York Compact of 1834 and the New Jersey-Delaware Compact of 1905 ..... J-1

APPENDIX K: Docket of Proceedings Before the Special Master K-1

APPENDIX A
Proposed Decree

STATE OF NEW JERSEY

v.

STATE OF DELAWARE

No. 134, Original

Decided _____

Decree Entered _____

Decree effecting this Court's Opinion of _____,

___ S. Ct. ___ (2007).

DECREE

The Court having exercised original jurisdiction over this controversy between two sovereign States; the issues having been tried before the Special Master appointed by the Court; the Court having received briefs and heard oral argument on the parties' exceptions to the Report of the Special Master; and the Court having issued its Opinion on all issues announced in ___ S. Ct. ___ (2007),

IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED AS FOLLOWS:

1. (a) The State of New Jersey may, under its laws, grant and thereafter exercise riparian jurisdiction over rights for the construction, maintenance and use of wharves and other riparian improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle and extending outshore of the low water mark; and further

(b) The State of Delaware may exercise, under its laws, full police power jurisdiction over the construction, maintenance and use of those same wharves and other improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle insofar as they extend outshore of the low water mark onto its sovereign territory.

2. Except as hereinbefore provided, the motions for summary judgment of both the States of New Jersey and Delaware are denied and their prayers for relief dismissed with prejudice.

3. The party States shall share equally in the compensation of the Special Master and his assistants, and in the costs of this litigation incurred by the Special Master.

4. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree or to effectuate the rights of the parties.

APPENDIX B
Compact of 1905

Act of January 24, 1907, Ch. 394, 34 Stat. 858 (1907)

CHAP. 394. – An Act Giving the consent of Congress to an agreement or compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States.

Whereas commissioners duly appointed on the part of the State of New Jersey and commissioners duly appointed on the part of the State of Delaware, for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States, have executed certain articles, which are contained in the words following, namely:

"First. Whereas a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius, an arc of which constitutes the northern boundary of the State of Delaware, and it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom; and

"Whereas there is now pending in the Supreme Court of the United States a cause wherein the said State of New Jersey is the complainant and the said State of Delaware is the defendant, in which cause an injunction has been issued against the State of Delaware restraining the execution of certain statutes of the State of Delaware relating to fisheries in said river, which said litigation hath been pending for twenty-seven years and upward; and

"Whereas for the purpose of adjusting the differences between the said two States arising out of said conflict of

jurisdiction, Edward C. Stokes, Robert H. McCarter, Franklin Murphy, and Chauncey G. Parker have been appointed commissioners on the part of the State of New Jersey by joint resolution of the legislature of said State, and Preston Lea, Robert H. Richards, Herbert H. Ward, and George H. Bates have been appointed commissioners on the part of the State of Delaware by joint resolution of the general assembly of said State, to frame a compact or agreement between the said States and legislation consequent thereon, to be submitted to the legislatures of said two States for action thereon, looking to the amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay: Now therefore,

"The said State of New Jersey, by its commissioners above named, and the said State of Delaware, by its commissioners above named, do hereby make and enter into a compact or agreement between said States as follows:

"ARTICLE I. Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy

and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.

"ART. II. Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.

"ART. III. The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river between lowwater marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.

"ART. IV. Immediately upon the execution hereof the legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States, which said commissioners for each State, respectively, shall, within two years from the date of their appointment, report to the legislature of each of said States the proposed laws so framed and recommended by said joint commission. Upon the adoption and passage of said laws so recommended by the respective legislatures of said two States said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said States. Said laws shall remain in force until altered, amended, or repealed by concurrent legislation of the said two States. Said commissioners shall also ascertain the dividing line between said river and bay, and upon each of the shores of said two States where said dividing line extended shall intersect the same, shall, at the joint expense of said States, erect a suitable monument to mark the said dividing line. Said dividing line between said monuments shall be the division line between the said river and bay for the interpretation of and for all purposes of this compact, and of the concurrent legislation provided for therein.

"The faith of the said contracting States is hereby pledged to the enactment of said laws so recommended by said commissioners, or to such concurrent legislation as may seem judicious and proper in the premises to the respective legislatures thereof.

"Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for.

"ART. V. All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.

"ART. VI. Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.

"ART. VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

"ART. VIII. Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.

"ART. IX. This agreement shall be executed by the said commissioners when authorized to do so by the legislatures of the said States. It shall thereupon be submitted to Congress for its consent and approval. Upon the ratification thereof by Congress it shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court of the

United States, in which the State of New Jersey is complainant and the State of Delaware is defendant, shall be discontinued without costs to either party and without prejudice. Pending the ratification hereof by Congress said suit shall remain in status quo.

"Done in two parts (one of which is retained by the commissioners of Delaware, to be delivered to the governor of that State, and the other one of which is retained by the commissioners of New Jersey, to be delivered to the governor of that State) this twenty-first day of March, in the year of our Lord one thousand nine hundred and five."

EDWARD C. STOKES, PRESTON LEA,
ROBERT H. MCCARTER, ROBERT H. RICHARDS,
FRANKLIN MURPHY, HERBERT H. WARD,
CHAUNCEY G. PARKER, GEO. H. BATES.

And whereas the said agreement has been confirmed by the legislatures of the said States of New Jersey and Delaware, respectively: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement and to each and every part and article thereof: *Provided*, That nothing therein contained shall be construed to impair or in any manner affect any right or jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

Approved, January 24, 1907.

APPENDIX C
Joint Statement of Facts

No. 134, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

JOINT STATEMENT OF FACTS

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Dated: December 26, 2006

JOINT STATEMENT OF FACTS

In connection with the filing of their initial dispositive motions on December 22, 2006, and pursuant to Case Management Order 14, dated November 9, 2006, the parties hereby stipulate to the following undisputed material facts:[1]

1. Delaware traces her title to that portion of the Delaware River and its bed encompassed by a circle of twelve miles from the town of New Castle, Delaware, to the low water mark on the eastern shore thereof (the "twelve-mile circle") through deeds going back to 1682.

2. From its earliest years as a State, and prior to the decision of the United States Supreme Court in *New Jersey v. Delaware II*, 291 U.S. 361 (1934), New Jersey claimed that, as a result of the American Revolution, that portion of the Delaware River lying between the thalweg of the Delaware River and the high water mark on the easterly shore within the twelve-mile circle became and remained vested in fee simple in New Jersey.

3. Salem County, New Jersey, Gloucester County, New Jersey, and New Castle County, Delaware, have boundaries that extend to the mean low water line on the easterly side of the Delaware River within the twelve-mile circle.

---

[1] To the extent that statements herein summarize documents in the record, the documents themselves are the best evidence of their contents. This Joint Statement does not reflect the relative materiality of any specific fact stated herein as compared with facts not included. Nor does the Joint Statement address whether any act described here was done with or without legal authority.

4. Within Salem County, New Jersey, the municipalities of Oldmans Township, Penns Grove Borough, Carneys Point Township, Pennsville Township, and Elsinboro Township have boundaries that extend to the mean low water line on the easterly side of the Delaware River within the twelve-mile circle.

5. Within Gloucester County, New Jersey, the municipality of Logan Township has a boundary that extends to the mean low water line on the easterly side of the Delaware River within the twelve-mile circle.

6. Within New Castle County, Delaware, the City of Wilmington has a boundary that extends to the mean low water line on the easterly side of the Delaware River within the twelve-mile circle. The town of Claymont, Delaware, lies on the western side of the Delaware River within the twelve-mile circle across from Logan Township, Gloucester County, New Jersey. The town of New Castle, Delaware, lies on the western side of the Delaware River within the twelve-mile circle across from Salem County, New Jersey.

7. New Jersey's and Delaware's boundary at the mean low water line on the easterly side of the Delaware River within the twelve-mile circle comprises approximately 29 miles.

8. On May 27, 1813, Delaware adopted an Act (Del. Laws 1829, p. 673) ceding to the United States jurisdiction over Pea Patch Island on the Delaware River within the twelve-mile circle.

9. In 1820, New Jersey passed a law appointing commissioners to meet with any commissioners Delaware might subsequently appoint in order "to make and conclude

an agreement between the said states of New-Jersey and Delaware, defining their respective boundaries, jurisdiction, rights to islands, subaqueous soil, fisheries and products of the river and bay of Delaware, southeasterly of the circular boundary between the states of Delaware and Pennsylvania." 1820 N.J. Laws p. 205.

10. In 1846, the New Jersey Legislature enacted a law setting the boundary line of Salem County at the main shipping channel of the Delaware River. 1846 N.J. Laws, approved April 10, 1846, 2 Comp. Stat. 1690.

11. On August 8, 1846, Congress passed an Act [9 Stat. 67] authorizing the president of the United States "to take such steps as he may deem advisable for adjusting the title to the Pea Patch Island" within the twelve-mile circle.

12. On January 15, 1848, an arbitrator issued a decision upholding the title to Pea Patch Island that Delaware had conveyed to the United States in 1813. *In re: Pea Patch Island*, 30 F. Cas. 1123 (Jan. 15, 1848).

13. In 1851, the New Jersey Legislature adopted 1851 N.J. Laws, p. 355, pertaining to the filling of underwater lands.

14. In 1852, Delaware adopted the Boundary Act of 1852, stating that the limits of Delaware extend to the "low water mark on the eastern side of the Delaware River, within the twelve mile circle from New Castle."

15. In 1854, the New Jersey Legislature adopted 1854 N.J. Laws ch. 143, p. 375, pertaining to the construction of docks, piers or wharves by Thomas D. Broadway, et al., in front of their lands at Pennsville in the Township of Lower Penns Neck, Salem County, New Jersey.

16. In 1855 the New Jersey Legislature adopted 1855 N.J. Laws ch. 109, p. 274, incorporating the Pennsgrove Pier Company and pertaining to construction of a wharf or pier extending from the mainland into the Delaware River at the Village of Pennsgrove.

17. In 1864, the New Jersey Legislature adopted 1864 New Jersey Laws c. 391, p. 681, establishing the Board of Riparian Commissioners. *See* N.J. Stat. Ann. 12:3-1.

18. In 1870 the New Jersey Legislature adopted 1870 N.J. Laws ch. 131, p. 346, pertaining to the construction of wharves, piers and bulkheads by Robert Walker, et al., in front of their lands in the Township of Upper Penns Neck (now Pennsville).

19. In 1870, the New Jersey Legislature adopted 1870 N.J. Laws ch. 344, p. 726, pertaining to construction of a dock or wharf by Joseph Guest in front of his lands in the Township of Upper Penns Neck, (now Pennsville) Salem County, New Jersey.

20. In 1871, the New Jersey Legislature adopted 1871 N.J. Laws ch. 307, p. 758, pertaining to construction of wharves or piers by Henry Barber in front of his lands in the Township of Upper Penns Neck, (now Pennsville) Salem County, New Jersey.

21. In 1871, the New Jersey Legislature adopted 1871 N.J. Laws, c. 256, pertaining to grants and leases of tidally-flowed underwater lands outshore of the mean high water line by the New Jersey Board of Riparian Commissioners and Governor. *See* N.J. Stat. Ann. 12:3-10.

22. On March 28, 1871, Delaware passed "An Act for the Protection of Fishermen," which provided, *inter alia*,

that it would be unlawful for any person not a citizen of Delaware to catch fish in the Delaware River within the limits of the state without obtaining a Delaware license.

23. On or about May 2, 1872, Delaware officials arrested twenty-two fishermen from New Jersey for fishing within the twelve-mile circle without a license from Delaware.

24. On May 8, 1872, New Jersey Governor Joel Parker issued a proclamation asserting New Jersey's claim to jurisdiction over that part of Delaware River between the States that is easterly of the middle of the river and "warn[ing] all persons not to molest, disturb, arrest, or attempt to arrest, without lawful process, issued by some legal authority in this State, any citizen of New Jersey, at any place within her jurisdiction."

25. On May 14, 1872, Delaware Governor James Ponder responded to Governor Parker's proclamation by asserting, "The State of Delaware does not regard the question as to her jurisdiction over the said river and bay, as claimed by her, as an open question. The jurisdiction thus claimed is exclusive over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle, and is regarded by said State as paramount to any which may be claimed by any other State."

26. By acts adopted on January 30, 1873 and February 14, 1873, Delaware authorized the appointment of three commissioners to meet with three commissioners from New Jersey to resolve whether the citizens of New Jersey had the right to fish in the Delaware River within the twelve-mile circle, and if so, the nature and extent of the right.

27. By acts approved on February 26, 1873 and March 11, 1873, New Jersey authorized the appointment of three commissioners to meet with three commissioners from Delaware to settle so much of the dispute between the States as Delaware had submitted, without affecting New Jersey's other claims or jurisdiction, and subject to confirmation by the respective legislatures of the States and Congress.

28. By act adopted on April 8, 1873, Delaware authorized its commissioners to make such a compromise as would secure to the people of Delaware and New Jersey the mutual right of fishery in the Delaware Bay and in the Delaware River within the twelve-mile circle.

29. The commissioners appointed by Delaware and New Jersey in 1873 held conferences and exchanged communications in 1873 and 1874, but their efforts to reach a settlement failed.

30. On March 13, 1877, New Jersey filed a bill of complaint and motion for preliminary injunction against Delaware in a case before the Supreme Court of the United States, No. 1, Original, referred to herein as *New Jersey v. Delaware I*. New Jersey claimed to own in fee simple the bed of the Delaware River from the New Jersey shore to the middle of the river, and claimed that on every part of the waters of the Delaware River it had and was entitled to an equal interest and concurrent jurisdiction with Delaware.

31. On March 26, 1877, the Supreme Court granted an injunction restraining Delaware from imposing any license or fee upon any citizen or resident of New Jersey as a condition of fishing in the Delaware River, and from arresting or fining any citizen or resident of New Jersey

for fishing in the Delaware River, until further order to the contrary.

32. On November 3, 1877, the Board of Riparian Commissioners of the State of New Jersey (Riparian Commissioners) adopted pierhead and bulkhead lines for a portion of the Delaware River within the twelve-mile circle offshore of the County of Gloucester and the County of Salem.

33. On February 17, 1883, New Jersey issued a tidelands grant to Daniel H. Kent of Wilmington, Delaware, which by its terms includes submerged lands. By its terms, Tract 1 of the February 17, 1883 grant extends 300 feet on one side and 400 feet on the other to the exterior line established by the Riparian Commissioners in the Delaware River and Salem Cove in 1877, and is described as "flowed by tide water lying in the Township of Elsinboro."

34. In 1891, the New Jersey Legislature adopted 1891 N.J. Laws, c. 123, pertaining to dredging under tidal waters. N.J. Stat. Ann. 12:3-21.

35. On September 15, 1891, New Jersey issued a tidelands grant to Annie E. Brown. By its terms, the 1891 grant to Annie E. Brown extended 850 feet on one side into the Delaware River and 850 feet on the other to the Exterior Line of the New Jersey Board of Riparian Commissioners and is described as pertaining to property "flowed by tide water lying in Pennsville in the Township of Lower Penn's Neck. . . ."

36. On November 27, 1891, New Jersey issued a tidelands grant to Eugene DuPont, et al., all of New Castle County, Delaware, trading as E.I. DuPont de Nemours and

Company ("Dupont") (the November 27, 1891 grant). The property covered by the November 27, 1891 grant is within the twelve-mile circle, and extends from high water into the Delaware River 550 feet to the New Jersey Board of Riparian Commissioners' Exterior Line.

37. On October 15, 1901, Delaware filed its Answer in *New Jersey v. Delaware I* denying New Jersey's claims and averring, *inter alia*, that Delaware is the owner of the whole bed of the Delaware River and of the river itself within the twelve mile circle to the low-water mark on the New Jersey shore.

38. On February 23, 1903, Delaware approved a joint resolution appointing a joint committee of members of its House and Senate to confer with Delaware's Attorney General and special counsel in *New Jersey v. Delaware I* "concerning the proper disposition of the territorial controversy between this State and the State of New Jersey, now pending in a cause in which the State of New Jersey is complainant and the said State of Delaware is defendant, in the Supreme Court of the United States." 22 Del. Laws ch. 472.

39. On March 5, 1903, New Jersey appointed three commissioners to confer with like commissioners from Delaware "for the purpose of framing a compact or agreement between the said states and legislation consequent thereon, to be submitted to the legislatures of said two states for action thereon, looking to the amicable termination of the suit between said States in the supreme court of the United States and the final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware river."

40. The commissioners of each State met between March 12-14, 1903, and on March 16, 1903, the commissioners from both States presented a draft compact to their respective legislatures.

41. The draft compact was approved by the New Jersey legislature on April 8, 1903, but was not approved by the Delaware legislature.

42. On April 9, 1903, Delaware approved a joint resolution formally appointing three commissioners to meet with commissioners from New Jersey "for the purpose of framing a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the amicable termination of the suit between the states in the Supreme Court of the United States and the final adjustment of all controversies relating to the boundary line between said States and their respective rights in the Delaware River." 22 Del. Laws ch. 473.

43. On February 13, 1905, Delaware adopted a joint resolution appointing four commissioners to confer with four commissioners from New Jersey "for the purpose of framing a compact or agreement between the states and legislation consequent thereon, to be submitted to the legislatures of said two states for action thereon, looking to the amicable termination of the suit between the states now pending in the Supreme Court of the United States and the final adjustment of all controversies relating to the boundary line between said states and their respective rights in the Delaware River and Bay."

44. On February 14, 1905, New Jersey passed a joint resolution appointing commissioners to confer with commissioners from Delaware "for the purpose of framing a

compact or agreement between the said states and legislation consequent thereon to be submitted to the legislatures of said two states for action thereon, looking to the amicable termination of the suit between said states now pending in the Supreme Court of the United States and the final adjustment of all controversies relating to the boundary line between said states and to their respective rights in the Delaware river and bay."

45. On February 18, 1905, the commissioners of Delaware and New Jersey met and agreed to the terms of a "Compact Between the State of New Jersey and the State of Delaware Relating to the Boundary Controversy Between Said States" (hereinafter, the "1905 Compact" or the "Compact").

46. On March 20, 1905, Delaware approved the 1905 Compact, subject to ratification by Congress.

47. On March 21, 1905, New Jersey approved the 1905 Compact, subject to ratification by Congress.

48. On March 23, 1905, Delaware approved an act appointing three commissioners to confer with like commissioners appointed by New Jersey to perform certain acts as stipulated in the 1905 Compact, including the drafting of uniform fishing laws.

49. On May 11, 1905, New Jersey approved an act appointing commissioners to confer with like commissioners from Delaware to perform certain acts as stipulated in the 1905 Compact, including the drafting of uniform fishing laws.

50. The commissioners thus appointed by the States formed the Joint Fisheries Commission.

51. On February 19, 1906, the special commissioner appointed by the Court in *New Jersey v. Delaware I* entered a report stating that in light of Congress's pending approval of the Compact, Delaware and New Jersey had requested that the case be suspended.

52. On February 23, 1906, counsel for Delaware and New Jersey entered into a stipulation requesting that the Court approve the special commissioner's February 19, 1906 report and authorizing the special commissioner to suspend the case.

53. On March 7, 1906, the Supreme Court suspended the case for sixty days.

54. On March 9, 1906, President Theodore Roosevelt forwarded to Congress a certified copy of the Compact.

55. On March 13, 1906, the United States Senate passed the Compact.

56. On May 16, 1906, New Jersey issued a tidelands grant to James A. Denny, et al., dated, covering property offshore of what is now known as Block 1, Lot 4, Penns Grove Borough, within the twelve-mile circle, and by the terms of the grant extending 500 feet waterward of high water into the Delaware River.

57. On October 16, 1906, the Supreme Court granted a motion to suspend the proceedings until February 4, 1907.

58. On January 16, 1907, the Joint Fisheries Commission agreed upon uniform fishing laws.

59. On January 24, 1907, the United States House of Representatives approved the Compact, thus making it

effective ("An Act Giving the consent of Congress to an agreement or compact entered into between the State of New Jersey and the State of Delaware respecting the territorial limits and jurisdiction of said States", Jan. 24, 1907, ch. 394, 34 Stat. 858).

60. On January 24, 1907, the Joint Fisheries Commission met and approved the uniform laws in the form that would be submitted to the respective legislatures.

61. On April 23, 1907, Delaware approved an "An Act Providing Uniform Laws to Regulate the Catching and Taking of Fish in the Delaware River and Bay Between the State of Delaware and the State of New Jersey."

62. On May 7, 1907, New Jersey passed "An Act Providing Uniform Laws to Regulate the Catching and Taking of Fish in the Delaware River and Bay Between the State of Delaware and the State of New Jersey."

63. Those 1907 Delaware and New Jersey fishing laws were not uniform.

64. On April 4, 1907, Delaware adopted an Act to cede to the United States submerged land within the twelve-mile circle east of the ship channel.

65. On March 29, 1907, the New Jersey Legislature adopted an act to cede to the United States the same submerged land within the twelve-mile circle east of the ship channel as is referenced in the preceding paragraph.

66. In 1914, the New Jersey Legislature adopted the Waterfront Development Law, 1914 N.J. Laws c. 123, pertaining to construction of waterfront developments such as a bulkhead, pier, wharf, dock. bridge, pipe line or cable. See N.J. Stat. Ann. 12:5-1 et seq.

67. In 1915, Delaware adopted the Boundary Act of 1915, declaring the limits of the State to extend to the low water mark on the Eastern side of the Delaware River within the twelve-mile circle.

68. On March 21, 1916, New Jersey issued a tidelands grant to Pennsgrove Pier Co. (the March 21, 1916 grant), by its terms covering property offshore of Penns Grove Borough, Salem County, New Jersey that extends 885 feet on one side and 975 feet on the other to the New Jersey Pierhead and Bulkhead line.

69. On March 27, 1916, New Jersey issued a tidelands lease to Harry S. Barber (the March 27, 1916 lease), by its terms covering property outshore of Block 54, Lots 1 and 2, Penns Grove Borough, extending 575 feet from the high water line into the Delaware River.

70. On August 21, 1916, the New Jersey Board of Commerce and Navigation adopted pierhead and bulkhead lines on part of the eastern portion of the Delaware River, outshore of mean low water within the twelve-mile circle (the New Jersey Pierhead and Bulkhead Lines (1916)).

71. On August 21, 1916, New Jersey issued a tidelands grant to DuPont (the August 21, 1916 grant), by its terms including nine tracts within the twelve-mile circle in either Pennsville Township, Carneys Point Township or Penns Grove Township. The tracts included in the August 21, 1916 grant extend from the high water mark into the Delaware River various distances, from 202 feet on one side of Tract One to 4,222.1 feet on one side of Tract Seven.

72. On November 20, 1916, New Jersey issued a tidelands grant to DuPont, by its terms covering property offshore of what is now known as Block 301, Lot 1,

Pennsville Township, at Deep Water Point, and within the twelve-mile circle (the November 20, 1916 grant). By its terms, the November 20, 1916 grant extends 661.3 feet from high water on one side and 650 feet on the other, into the Delaware River, both to the New Jersey Pierhead and Bulkhead line (1916).

73. On March 27, 1917, New Jersey passed a law granting jurisdiction over and title to lands in the Delaware River to the United States for bulkhead and fill. 1917 N.J. Laws ch. 189.

74. On July 16, 1917, New Jersey issued a tidelands grant to DuPont, by its terms consisting of two tracts that are offshore of what is now known as Block 1 or 301, Lot 1, Pennsville Township, and within the twelve-mile circle (the July 16, 1917 grant). By its terms the July 16, 1917 grant extends 668 feet on one side of tract 1, and 648 feet on both sides of tract 2, offshore of the high water line and into the Delaware River, all to the New Jersey Pierhead and Bulkhead line (1916) and by its terms is described as property "flowed by tide water situate at Deep Water Point, in the County of Salem. . . ."

75. Between 1918 and 1939 there existed a New Jersey State tidelands lease to DuPont dated May 20, 1918 (the May 20, 1918 lease).

76. On October 17, 1921, New Jersey issued a tidelands grant to French's Hotel Company, by its terms covering property offshore of what is now known as Block 57, Lot 1, Penns Grove Borough, and within the twelve-mile circle (the October 17, 1921 grant). By the terms of the grant, the property covered by the October 17, 1921 grant extends offshore from the high water mark 1,135.38

feet on one side and 1,283.86 feet on the other, and into the Delaware River.

77. On February 19, 1923, New Jersey issued a tidelands grant to William D. Acton, by its terms covering property now offshore of Pennsville Township, within the twelve-mile circle (the February 19, 1923 grant). The property covered by the February 19, 1923 grant extends 333.52 feet from the high water line to the corner of a pre-existing pier, and another 580 feet further waterward to the 1916 pierhead and bulkhead line on one side, and 360.75 feet from the original high water line to a corner of the pre-existing pier, and another 572.66 feet further waterward to the New Jersey Pierhead and Bulkhead line (1916), on the other side. The February 19, 1923 grant refers to a pier.

78. On November 19, 1923, New Jersey issued a tidelands grant to William D. Acton, by its terms covering property extending 970 feet on one side from the high water mark into the Delaware River, and 964 feet from the high water line on the other side to the 1916 pierhead and bulkhead line, outshore of the Township of Lower Penns Neck, Salem County, New Jersey.

79. On August 18, 1924, New Jersey issued a tidelands lease to Fogg and Hires Company for 15 years (the Fogg and Hires lease), by its terms covering property offshore of what is now known as Block 2801, Lot 6, Pennsville Township, at the foot of Ferry Road, and within the twelve-mile circle. By its terms the property covered by the Fogg and Hires Co. lease extended 985.44 feet offshore from the high water line of the Delaware River on one side and an approximately equal distance offshore on the other side to the New Jersey Pierhead and Bulkhead

line (1916). The Fogg and Hires Co. lease was cancelled May 18, 1930 and replaced with a State of New Jersey grant to the Delaware-New Jersey Ferry Company dated May 19, 1930, which grant encompassed a property with the same dimensions and location as the Fogg and Hires lease.

80. On April 14, 1925, Delaware adopted an Act (34 Del. L. p. 6) to cede to the United States 605 acres of lands within the twelve-mile circle, to the low water mark on the easterly side of the Delaware River, for the purpose of constructing a basin for the reception of material dredged from the channel of the Delaware River.

81. On August 17, 1925, New Jersey issued a tidelands grant to William D. Acton, by its terms covering property that extends 863.21 feet from the high water line into the Delaware River on one side, and 853.87 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916), offshore of Lower Penns Neck (now Pennsville Township), Salem County, New Jersey.

82. On August 17, 1925, New Jersey issued a second tidelands grant to William D. Acton, by its terms covering property located offshore of Lower Penns Neck (now Pennsville Township), Salem County, New Jersey, that extends 965.40 feet on one side and 966.63 feet on the other beyond the former high water line of the Delaware River to the New Jersey Pierhead and Bulkhead line (1916). The records of the Army Corps of Engineers indicate that a permit was issued to W.D. Acton to construct a Timber Pier to be located offshore of the North side of Pittsfield Street, Pennsville, and that the pier completed May 22, 1926 was 550 feet long.

83. On September 21, 1925, New Jersey issued a tidelands grant to the Township of Lower Penns Neck (the September 21, 1925 grant), covering property that is now offshore of Pennsville Township, within the twelve-mile circle. By its terms, the property covered by the September 21, 1925 grant extends 966.83 feet on one side and 969.91 feet on the other, outshore of the former high water line of the Delaware River.

84. On October 19, 1925, New Jersey issued a tidelands grant to William D. Acton, dated by its terms covering property that is now outshore of Pennsville Township, within the twelve-mile circle (the October 19, 1925 grant). By the terms of the grant, the property covered by the October 19, 1925 grant extends waterward from the former high water line 360.75 feet to a point on an adjoining pier, and then another 572.66 feet into the Delaware River on one side to the New Jersey Pierhead and Bulkhead Lines (1916), and 375.41 feet to a point waterward and then another 565.67 feet further waterward into the Delaware River to the New Jersey Pierhead and Bulkhead line (1916) on the other side.

85. In 1925, oyster boats from Delaware dredged and took many thousands of bushels of seed oysters from subaqueous lands claimed by New Jersey.

86. On February 21, 1927, Delaware adopted an Act (35 Del. L. pp. 6-8) to cede to the United States 1,541 acres of submerged lands within the twelve-mile circle, to the low water mark on the easterly side of the Delaware River, for the purpose of constructing a basin for the reception of material dredged from the channel of the Delaware River.

87. On March 2, 1927, Delaware adopted a joint resolution appointing a commission "for the purpose of

framing a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware River and Bay."

88. On March 28, 1927, New Jersey adopted a joint resolution appointing a commission for "for the purpose of framing a compact or agreement between the said States and legislation consequent thereon, to be submitted to the Legislatures of said two States for action thereon, looking to the final adjustment of all controversies relating to the boundary line between said States and to their respective rights in the Delaware River and Bay.". The joint commission appointed in 1927 met during 1928-1929 but was unable to reach agreement.

89. On June 19, 1928, New Jersey issued a tidelands grant to The Franklin Real Estate Company by its terms covering property that is now offshore of Block 301, Lot 13, Pennsville Township, within the twelve-mile circle, and that extends 991.46 feet from high water into the Delaware River on one side and 827.70 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916).

90. On May 6, 1929, the New Jersey legislature passed a joint resolution authorizing its attorney general to bring suit against Delaware in the Supreme Court to "fix and determine the boundary line between Delaware and New Jersey from the Pennsylvania line, through the Delaware River, to the Atlantic Ocean."

91. On April 15, 1929, New Jersey issued a tidelands grant to William G. Locuson (the William Locuson grant) covering property offshore of what is now known as Block

301, Lot 9, Pennsville Township, within the twelve-mile circle. By the terms of the grant, the property covered by the William Locuson grant extends 827.70 feet waterward of the high water line on one side and 823.60 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916).

92. On April 15, 1929, New Jersey issued a tidelands grant to Anna C.B. Locuson (the Anna Locuson grant), by its terms covering property located offshore of Pennsville Township, and within the twelve-mile circle, that extends 813.97 feet into the Delaware River from the high water line on one side and 809.16 feet from the high water line on the other, both to the New Jersey Pierhead and Bulkhead Lines (1916).

93. On April 15, 1929, New Jersey issued a tidelands grant to Josephine Grace Locuson, et al., dated April 15, 1929 (the Josephine Locuson grant), covering property offshore of Pennsville Township and within the twelve-mile circle, that by its terms extends from the high water line of the Delaware River waterward 813.97 feet on one side and approximately 818.78 feet on the other, both to the New Jersey Pierhead and Bulkhead Line (1916).

94. On April 15, 1929, New Jersey issued a tidelands grant to Josephine Grace Locuson, et al., (the second Josephine Locuson grant), covering property offshore of Pennsville Township, and within the twelve-mile circle, that by its terms extends from the high water mark 823.60 feet on one side and 818.78 feet on the other, into the Delaware River, both to the New Jersey Pierhead and Bulkhead line (1916).

95. On June 3, 1929, New Jersey filed a complaint against the State of Delaware in the Supreme Court,

originally docketed as No. 19, Original (October Term, 1929) and referred to herein as *New Jersey v. Delaware II*.

96. On June 17, 1929, New Jersey issued a tidelands grant to Josephine Grace Locuson et al. (the June 17, 1929 grant), covering property offshore of Pennsville Township, within the twelve-mile circle. By the terms of the grant, the property covered by the June 17, 1929 grant extends from the high water line 809.16 feet into the Delaware River on one side and 797.42 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916).

97. On or about October 9, 1929, Delaware filed its Answer in *New Jersey v. Delaware II*.

98. On October 21, 1929, New Jersey issued a tidelands grant to DuPont (the October 21, 1929 grant), covering property offshore of what is now known as Block 1 or 301, Lot 1, Pennsville Township, within the twelve-mile circle. By the terms of the grant, the property covered by the October 21, 1929 grant extends from the mean high water mark 648 feet into the Delaware River to the New Jersey Pierhead and Bulkhead line (1916).

99. On October 21, 1929, New Jersey issued a tidelands license to the Delaware River Power Company (the October 21, 1929 license), covering property offshore of Pennsville Township within the twelve-mile circle. By its terms the October 21, 1929 license allows for eight armored submarine electric cables at Deep Water Point.

100. On October 21, 1929, New Jersey issued a tidelands lease to the Penn Beach Property Owners' Association (the October 21, 1929 lease). By its terms the property covered by the October 21, 1929 lease was a "tract of land flowed by tide-water situate in the Township

of Lower Penns Neck," Salem County, and extended 429.49 feet beyond the mean high water line on one side and 430.70 feet on the other to the New Jersey Pierhead and Bulkhead Lines (1916).

101. On January 6, 1930, the Supreme Court appointed William L. Rawls as special master in *New Jersey v. Delaware II*.

102. On October 9, 1933, Special Master Rawls entered his report in *New Jersey v. Delaware II*.

103. On February 5, 1934, the Supreme Court entered its opinion in *New Jersey v. Delaware II*.

104. On June 3, 1935, the Supreme Court entered its decree in *New Jersey v. Delaware II*.

105. On September 16, 1935, New Jersey issued a tidelands grant to J. Landis Strickler covering property outshore of Block 54, Lot 1, Penns Grove Borough that extends 249.36 feet waterward of the center line of Delaware Avenue.

106. There is a State of New Jersey tidelands grant to DuPont dated September 13, 1943 (the September 13, 1943 grant).

107. On October 14, 1957, New Jersey issued a tidelands grant to Sun Oil Company dated (the October 14, 1957 grant) covering property outshore of what is now known as Block 101, Lots 2 and 5, Logan Township, Gloucester County, and within the twelve–mile circle. The property covered by the October 14, 1957 grant extends 1,245 feet from the mean high water line on one side and 1,245.82 feet on the other into the Delaware River.

108. On March 31, 1960, New Jersey issued a tidelands grant to DuPont (the March 31, 1960 grant), covering property outshore of Pennsville Township, within the twelve-mile circle. The property covered by the March 31, 1960 grant extends 1,027.61 feet waterward of the high water line of the Delaware River on one side and 1,096 feet on the other, both sides out to the New Jersey Pierhead and Bulkhead line (1916). The March 31, 1960 grant includes as a second tract a further area 100 feet waterward of the New Jersey Pierhead and Bulkhead line (1916).

109. In 1961, Delaware adopted a statute pertaining to the sale, lease, or granting of easements to subaqueous public lands. 53 Del. Laws ch. 34.

110. On January 11, 1962, Delaware entered into a twenty-year subaqueous land lease allowing the SunOlin Chemical Company to use Delaware subaqueous soil within the twelve-mile circle to construct, maintain, repair, replace, renew and operate submarine pipelines across the Delaware River from Claymont, Delaware to Gloucester County, New Jersey. Delaware renewed this lease on November 14, 1981 for a period of ten years. This lease was again renewed on October 15, 1991 for a period of ten years, and on May 15, 2002 for a period of twenty years.

111. On October 9, 1963, Delaware entered into a ten-year subaqueous land lease allowing the Colonial Pipeline Company to use Delaware subaqueous soil within the twelve-mile circle near Logan Township, New Jersey to construct, maintain, inspect, operate, renew, replace, repair, improve and remove submarine pipelines, from

Claymont, Delaware to Logan Township, Gloucester County, New Jersey.

112. In 1966, Delaware adopted an Underwater Lands Act pertaining to the sale, lease, or granting of easements to subaqueous public lands. 55 Del. Laws. ch. 442.

113. On or about September 29, 1967, New Jersey issued a tidelands grant to DuPont (the September 29, 1967 grant). By the terms of the grant, the property covered by the September 29, 1967 grant is outshore of Pennsville Township and abuts to the north the March 31, 1960 grant to DuPont. The property covered by the September 29, 1967 grant extends 1,096 feet waterward of the high water line of the Delaware River on one side and 1,155 feet on the other.

114. In 1970, the New Jersey Legislature enacted the Wetlands Act of 1970 to protect coastal wetlands, including tidally-flowed wetlands along the Delaware Bay and River. N.J. Law of 1970, c. 272, now codified as N.J. Stat. Ann. 13:9A-1 et seq.

115. In 1971, Delaware adopted the Delaware Coastal Zone Act ("DCZA"). Del. Code Ann., tit. 7, § 7001 *et seq.*

116. On or about September 29, 1971, Delaware granted a ten-year lease to allow DuPont to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility within the twelve-mile circle near the New Jersey shore. By its terms, the lease is "without prejudice to the title claim of either party."

117. In December 1971, the El Paso Eastern Company submitted a proposal to construct a liquefied natural gas ("LNG") facility in New Jersey, which included a proposal to build a pier from the New Jersey shore into Delaware within the twelve-mile circle. On February 23, 1972, Delaware issued a status decision stating that El Paso's proposal was a prohibited use under the DCZA.

118. In 1972, the Federal government adopted the Coastal Zone Management Act ("CZMA"). 16 U.S.C. § 1451 *et seq.*

119. In 1973, the New Jersey Legislature enacted the Coastal Area Facility Review Act ("CAFRA") to protect New Jersey's coastal zone. N.J. Law of 1993, c. 185, now codified as N.J. Stat. Ann. 13:19-1 et seq.

120. In 1977, the New Jersey Legislature enacted the Water Pollution Control Act, to allow New Jersey, among other things, to administer the discharge permitting program then administered by the federal government through the federal Clean Water Act. N.J. Law of 1977, c. 74, now codified as N.J. Stat. Ann. 58:10A-1 et seq.

121. On September 16, 1977, the New Jersey Department of Environmental Protection ("NJDEP") issued a permit to Dupont for maintenance dredging at Dupont's Chambers Works facility beyond the low water line of the Delaware River, within the twelve-mile circle.

122. In 1977, NJDEP issued to Dupont a permit to dismantle and remove wastewater outfall structures in the Delaware River within the twelve-mile circle.

123. In 1978, the Federal government approved New Jersey's coastal management plan with respect to most coastal areas.

124. In March 1979, New Jersey issued a report entitled Options for New Jersey's Developed Coast.

125. In March 1980, the Federal government approved Delaware's coastal zone management plan, which includes the DCZA.

126. In August 1980, the Federal government approved New Jersey's coastal zone management plan with respect to all coastal areas.

127. On March 18, 1982, Delaware issued a Letter of Authorization to DuPont in Deepwater, New Jersey by its terms allowing DuPont to repair and replace an existing 36 pile cluster in subaqueous soil within the twelve-mile circle outshore of low water.

128. In 1982, NJDEP issued a waterfront development permit and water quality certificate for the DuPont facility in Carneys Point and Pennsville, New Jersey, by the terms of the permit allowing dredging of the berth area of an existing pier.

129. In 1982, NJDEP issued to DuPont a waterfront development permit for a new sheet piling cell, by its terms allowing replacement of an existing timber cluster on the Delaware River, at Dupont's Chambers Works Plant in Deepwater, New Jersey.

130. In 1986, Delaware adopted a Subaqueous Lands Act pertaining to public and private subaqueous lands. Del. Code Ann., tit. 7, ch. 72.

131. In 1987, NJDEP issued New Jersey Pollution Discharge Elimination System permit NJ0005100DSW to Dupont, allowing it to discharge effluent from its

Chambers Works facility in Pennsville Township, New Jersey, into the Delaware River.

132. On July 28, 1987, Delaware entered into a ten-year subaqueous lands lease allowing the Columbia Gas Transmission Corp. to construct a submerged natural gas pipeline across the Delaware River within the twelve-mile circle. The lease also allowed Columbia Gas to dredge 552 cubic yards of material from subaqueous lands within the twelve-mile circle. This lease was renewed on January 8, 1998.

133. On August 3, 1987, Delaware entered into a ten-year subaqueous lands lease allowing the Colonial Pipeline Company to construct a 30 inch submerged petroleum pipeline across the Delaware River within the twelve-mile circle, and dredge subaqueous lands within the twelve-mile circle.

134. On July 13, 1990, Keystone Cogeneration Systems Inc., currently known as the Logan Generating Company, applied to Delaware's Department of Natural Resources and Environmental Control ("DNREC") for a status decision relating to its proposal to build a 200 megawatt coal-fueled cogeneration facility in Logan Township, New Jersey, including a 1,100 pier extending from the New Jersey shore into Delaware territory within the twelve-mile circle. In a status decision dated November 19, 1990, DNREC determined that the Keystone project did not constitute a prohibited bulk product transfer facility under the DZCA and that a permit under the DCZA was required. DNREC issued a coastal zone permit to Keystone on December 13, 1991.

135. On September 30, 1991, DNREC issued a subaqueous lands lease by its terms permitting the construction of the coal unloading pier and permitting the dredging of 40,000 cubic yards of material from the Delaware River within the twelve-mile circle. On May 28, 1993, Delaware issued additional approvals for the Keystone facility to allow for a modification of pier dimensions. On March 15, 1995, Delaware issued a letter of authorization for a one year extension of the subaqueous lands permit issued on September 30, 1991, and provided permission to dredge an additional 13,750 cubic yards of material within the twelve-mile circle. On November 12, 1997, Delaware issued a letter of authorization for maintenance dredging at the facility. On November 9, 2001, Delaware issued a renewal to maintain a pier, docks and dolphins at the facility.

136. On September 24, 1991, NJDEP issued to Keystone Cogeneration Systems Inc. in Logan Township, New Jersey, stream encroachment, waterfront development and freshwater wetlands permits and a Water Quality Certificate, for a coal unloading facility and a 1600-foot approach-way pier.

137. On June 12, 1992, New Jersey issued a lease to Keystone Urban Renewal Limited Partnership (the June 12, 1992 lease), by its terms covering property outshore of what is now known as Block 101, Lots 2 and 5, Logan Township, Gloucester County and outshore of part of the property covered by the October 14, 1957 Grant to the Sun Oil Company. By its terms, the property covered by the June 12, 1992 lease extends approximately 1,600 feet offshore of the original mean high water line into the Delaware River, within the twelve-mile circle.

138. In September 1995, NJDEP Division of Parks and Forestry applied to DNREC for a subaqueous land lease to permit New Jersey to rehabilitate a pier and construct a new floating ferry dock on Delaware subaqueous soil within the twelve-mile circle near Fort Mott State Park in Pennsville Township, New Jersey. On February 7, 1996, Delaware entered into a ten-year subaqueous land lease with the NJDEP Division of Parks and Forestry.

139. On January 24, 1996, NJDEP issued a waterfront development permit to NJDEP's Division of Parks and Forestry for the rehabilitation of the historic pier at Fort Mott State Park in Pennsville Township, and other work specified in the permit.

140. In 1996 NJDEP issued and renewed in 2005 a water allocation permit for the Keystone Cogeneration Systems, Inc. facility located in Logan Township. The water allocation permit allows the facility to withdraw up to 108.5 million gallons of water per month from the Delaware River through an intake structure located beyond the low water line, within the twelve-mile circle, that extends approximately 1,600 feet into the Delaware River.

141. On December 9, 1997, Delaware entered into a ten-year subaqueous land lease allowing Delmarva Power and Light Company to install 3,755 linear feet of submarine fiber optic cable in the Delaware River within the twelve-mile circle extending from Pigeon Point in New Castle County, Delaware, to Deepwater Point in New Jersey. This lease was amended on March 11, 2002.

142. On March 22, 2000, NJDEP issued to Pennsville Township a waterfront development permit for removal of a municipal boat ramp and construction of a new ramp.

143. There is a lease to William G. Bergmann, et al., by the State of New Jersey initially dated January 11, 1999, and renewed February 13, 2002 (the January 11, 1999 lease). By the terms of the lease, the property covered by the January 11, 1999 lease extends 35 feet waterward of the high water line, and is located offshore of what is now known as Block 1601, Lot 25, on North River Drive in the Township of Pennsville.

144. There is a lease to the Township of Pennsville by the State of New Jersey dated April 25, 2000 (the April 25, 2000 lease), by its terms covering property outshore of Block 3428, part of Lot 1, Township of Pennsville, at the foot of Dartmouth Road, that extends 95 feet offshore of the existing bulkhead and mean high water line (1999).

145. On January 24, 2001, New Jersey granted an Assignment of Management Rights (lease) to the New Jersey Division of Parks and Forestry (the January 24, 2001 lease), covering property offshore of Block 5301, Lot 3, Pennsville Township, and within the twelve-mile circle. By the lease terms, the property subject to the January 24, 2001 lease includes a pier offshore of Block 5301, Lot 3, Pennsville Township that extends 350 feet waterward of the high water line into the Delaware River.

146. On February 20, 2001, NJDEP issued to Pennsville Township a waterfront development permit for installation of stormwater force main pipes, which were 113 feet long.

147. On May 4, 2001, Delaware issued a subaqueous lands permit to DuPont Chambers Works located near Deepwater, New Jersey, by its terms allowing DuPont to dredge approximately 4,650 cubic yards of material from the Delaware River within the twelve-mile circle, to backfill

existing elevations on a 0.71 acre site in the Delaware River, and to install a temporary sheet pile wall surrounding the proposed excavation in the Delaware River.

148. On May 10, 2005, the Delaware Wetlands and Subaqueous Lands Section issued a twenty-year subaqueous lands lease and a water quality certification to Fenwick Commons, LLC ("Fenwick") in connection with a project to rehabilitate a dilapidated pier at the end of west main street in Penns Grove, New Jersey. By its terms, the lease permits Fenwick to construct a 40 foot wide by 750 foot long pier, a 6 foot wide by 95 foot long aluminum gangway, a 28 foot wide by 120 foot long floating dock and breakwater, 6 support pilings, 1,255 linear feet of steel bulkhead and permission to fill 1,882 square feet of public subaqueous lands near Penns Grove, New Jersey. On May 6, 2005, counsel for Fenwick wrote to DNREC stating that "the issue as to the ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey."

149. On August 10, 2006, the New Jersey State Park Service applied to Delaware to renew its subaqueous lands lease for the Fort Mott pier. On December 19, 2006, a New Jersey official wrote to DNREC that the Park Service's lease application was "without prejudice" to New Jersey's position in this lawsuit.

150. On September 27, 2004, British Petroleum ("BP"), through its wholly owned indirect subsidiary, Crown Landing, LLC, requested permission from NREC's Wetlands and Subaqueous Lands Section to drill geotechnical test borings in the Delaware River in connection with a proposal to construct a liquefied natural gas ("LNG") terminal on the Delaware River. The proposed facility is commonly referred to as the "Crown Landing project" or "Crown Landing facility."

151. BP's proposed Crown Landing facility would include an LNG plant, storage facility, as well as other structures in New Jersey and a pier and related structures that extend into Delaware within the twelve-mile circle.

152. The portion of BP's proposed Crown Landing facility located in Delaware would include an LNG transfer system installed on the unloading platform to transfer the LNG from the ship to three 150,000-cubic-meter storage tanks located in New Jersey.

153. BP's proposed Crown Landing facility would require the dredging of 1.24 million cubic yards of subaqueous soil, which would disturb approximately 29 acres of the bed of the river within Delaware territory.

154. On December 7, 2004, BP, through its wholly-owned indirect subsidiary, Crown Landing, LLC, applied to DNREC for a status determination under the Delaware Coastal Zone Act for the proposed Crown Landing project.

155. On January 7, 2005, BP filed a Waterfront Development Application with the NJDEP's Office of Dredging and Sediment Technology.

156. On February 3, 2005, DNREC issued a status decision determining that BP's proposed project was a prohibited "offshore bulk transfer facility" as well as a prohibited "heavy industry use" under the Delaware Coastal Zone Act.

157. On February 15, 2005, BP filed an administrative appeal to the Delaware Coastal Zone Industrial Board ("CZICB").

158. On April 14, 2005, the CZICB affirmed DNREC's status decision determining that BP's Crown Landing

project was a bulk product transfer facility prohibited under the DCZA. BP did not appeal that decision.

159. On July 28, 2005, New Jersey filed in the Supreme Court a Motion to Reopen and for Supplemental Decree in No. 11, Original, accompanied by a petition and brief in support thereof.

160. By order dated November 28, 2005, the Court denied New Jersey's Motion to Reopen and directed that the petition filed therewith be treated as a Bill of Complaint in No. 134, Original, which the parties refer to as *New Jersey v. Delaware III*.

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Dated: December 26, 2006

APPENDIX D

Order on New Jersey's Motion to Strike Proposed Issues of Fact

No. 134, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff

v.

STATE OF DELAWARE,

Defendant

OFFICE OF THE SPECIAL MASTER

ORDER ON NEW JERSEY'S MOTION TO STRIKE DELAWARE'S PROPOSED ISSUES OF FACT NOS. 1, 2, 6, 8 AND 9 AND TO PRECLUDE DISCOVERY ON THOSE ISSUES

June 13, 2006

ORDER

Upon consideration of New Jersey's Motion to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8 and 9 and to Preclude Discovery on These Issues, Delaware's Opposition thereto, and New Jersey's Reply, and after oral argument held on June 7, 2006, IT IS HEREBY ORDERED:

1. *Delaware's Proposed Issue of Fact No. 1*: New Jersey's motion to strike is granted.

Delaware asserts as a relevant factual issue, and seeks discovery concerning, any projects other than the Crown Landing LNG facility that "are under consideration or pending for approval in New Jersey within the twelve-mile circle and implicate Article VII or VIII" of the Compact of 1905.

To the extent the Compact is found to be ambiguous, it may be appropriate to look to extrinsic evidence of the States' intentions and course of conduct. But, as Delaware itself has recognized, information concerning other proposed projects that might be in the development pipeline – but that have not been approved or for which approval has not been sought in either state – cannot be useful in clarifying any ambiguity in the meaning of the grant of riparian jurisdiction to the states contained in the Compact. (*See* Def. Opp. to Motion to Strike Issues of Fact at 21.)

Delaware apparently seeks to have the Court render an opinion on whether any manner of speculative development that could conceivably be proposed in the future on New Jersey's shore within the twelve-mile circle would fall within the scope of the Compact's reservation of riparian jurisdiction. But whether private parties someday might propose "casinos, restaurants, heliports, amusement parks, or adult entertainment" on the New Jersey side of the Delaware River, whether such projects might be permitted by New Jersey under its applicable laws and regulations, and whether Delaware itself might assert jurisdiction to regulate such proposed projects under state law are all abstract, hypothetical questions. What the

Court is asked to do in this case is to determine the scope and meaning of the language of the Compact framed against the backdrop of a particular project, the Crown Landing LNG facility, over which Delaware has asserted jurisdiction and for which Delaware has declined to issue permits under Delaware law. As discussed below, the scope and particulars of that project, which brought the dispute between the states to a head, are potentially relevant in analyzing the meaning of the Compact. But, evidence of any possible but yet unrealized future proposals could not be relevant to the legal issue that the Court has to resolve.

2. *Delaware's Proposed Issue of Fact No. 2*: New Jersey's motion to strike is granted.

Delaware has asserted as a relevant factual issue, and seeks discovery concerning, the "relationship of BP's commercial interests in obtaining regulatory approval of the Crown Landing project to New Jersey's decision to bring this action." By granting New Jersey leave to file its Bill of Complaint, the Court has already – at least implicitly – determined that New Jersey is a real party in interest and that the Court does have jurisdiction over this dispute.

That implicit holding is reinforced by the fact that, in response to New Jersey's attempt to obtain permission to file a Petition to Reopen No. 11, Original, Delaware argued that the Court "lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two states." (Def. Opp. to Mot. to Reopen & for Supp. Decree at 21.) Thus, the Court must have considered the matter in deciding to grant New Jersey leave to file its Bill of Complaint. In light of that determination and in the absence of any instruction from the Court to reconsider Delaware's

jurisdictional arguments, it is inappropriate for the Special Master to reconsider the Court's implicit ruling that BP's role in urging or assisting New Jersey in the pursuit of this action is insufficient to defeat the Court's original jurisdiction.

Apart from the Court's implicit ruling, it is clear in any event that New Jersey is a real party in interest – even assuming the level of involvement by BP that Delaware suggests. New Jersey seeks to enforce its sovereign rights to whatever riparian jurisdiction is reserved to it under the Compact. The possibility that BP might benefit from a ruling in New Jersey's favor does not eliminate New Jersey's own independent interest in pursuing this original action against a sister state. Even the assumption – or the fact – that BP is funding New Jersey's litigation costs, providing tactical litigation support, operating under a "common interest" agreement and otherwise attempting to persuade or even goad New Jersey into filing and pursuing this action, could not negate New Jersey's own interest in enforcing its sovereign interests under the Compact.

Delaware recognizes in its brief that "the relief New Jersey seeks goes well beyond BP's project." (Def. Opp. to Mot. to Strike Issues of Fact at 21.) That does indeed appear to be the case, in that New Jersey is seeking resolution of a long-disputed question of interpretation of the Compact that, although implicated most recently by the Crown Landing facility, extends beyond any single project. It is apparent that New Jersey does have a legitimate interest in this dispute and is a real party in interest. Accordingly, discovery into the relationship between BP's commercial interests in obtaining regulatory approval of the Crown Landing project to New Jersey's decision to

bring this action cannot lead to the production of admissible evidence bearing on the central issue in dispute in this case.[1]

3. *Delaware's Proposed Issue of Fact No. 6*: New Jersey's motion to strike is denied.

Delaware has identified as a factual issue, and seeks discovery related to, whether "other projects previously approved by New Jersey within the twelve-mile circle required the dredging of Delaware's submerged land," and if so whether "the dredging has been on a scale commensurate with BP's Crown Landing project." As discussed above, to the extent the Compact is found to be ambiguous, interpretation of the meaning of the wording of the Compact

[1] Because the Special Master has determined that discovery into the relationship between BP and New Jersey in causing the latter to bring this suit is inappropriate for the reasons stated above, it is unnecessary to resolve New Jersey's other bases for precluding discovery into the role BP might have played in New Jersey's decision to bring this action. (*See* Pl. Mot. to Strike Issues of Fact at 19-21; Pl. Reply in Supp. Mot. to Strike Issues of Fact at 11, 16-17.) Delaware also posits that it is "entitled to discovery on whether an alternative site for BP's LNG facility exists that would not necessitate encroachment on Delaware's soil." (Def. Opp. to Motion to Strike Issues of Fact at 10.) It is unclear how that relates to the Court's jurisdiction. This is an original jurisdiction action involving a dispute over the states' sovereignty and riparian rights on New Jersey's side of the Delaware River within the twelve-mile circle. The Court is not asked to evaluate the merits of the proposed LNG facility or its overall compatibility with state law. Thus, information regarding alternative locations within New Jersey for an LNG facility will not assist in determining the meaning of the Compact. The Court must resolve whether New Jersey or Delaware or conceivably both has/have jurisdiction under the Compact to regulate facilities such as the proposed LNG facility within the twelve-mile circle – not anywhere else within New Jersey's borders where such a facility might be constructed.

might entail a review of the parties' course of conduct in the 101 years since the Compact's ratification.

New Jersey now concedes that it "does not object to this issue, to the extent it contemplates discovery concerning other projects previously approved by New Jersey within the Twelve-Mile Circle that have involved dredging." (Pl. Reply in Supp. of Mot. to Strike Issues of Fact at 18.) As New Jersey now agrees, "such projects are part of the States' course of performance under the 1905 Compact." (*Id.*)

New Jersey's only apparent remaining objection is that the Crown Landing project "is the subject of voluminous public filings containing detailed information on the scope and status of the project," so Delaware should look there for information. (*Id.* at 19.) However, the fact that many documents concerning the Crown Landing project might be available from public sources has no bearing on whether responsive documents concerning other projects – which is the subject of Delaware's Issue of Fact No. 6 – are readily available from public sources. New Jersey has not identified any such public repository from which Delaware could easily obtain such files. Thus, as New Jersey essentially concedes, because Delaware's Issue of Fact No. 6 is relevant, discovery should be permitted.

4. *Delaware's Proposed Issue of Fact No. 8*: New Jersey's motion to strike is denied.

Delaware seeks discovery regarding "the nature and scope of BP's Crown Landing liquefied natural gas unloading facility." Under Delaware's apparent theory of the case,

> for New Jersey to prevail, it will have to prove not only that, in the 1905 Compact, Delaware

> relinquished authority over projects built on Delaware's land within the twelve-mile circle, but also that a project of both the nature and the scope of the Crown Landing facility was within Delaware's contemplation when it was alleged to have relinquished its sovereign right to regulate activities on its lands.

(Def. Opp. to Mot. to Strike Issues of Fact at 23.)

Although the main issue in this case is the existence and scope of riparian jurisdiction reserved to New Jersey under the Compact, this dispute is set against the background of Delaware's denial of the Crown Landing project in particular. Such information arguably is relevant to "Delaware's argument that the Crown Landing facility is qualitatively different from the types of projects within the contemplation of each State at the time the 1905 Compact was drafted and ratified." (Def. Opp. to Motion to Strike at 24.) Again, while BP is not a party to this original action and New Jersey is properly asserting sovereign interests distinct from the interests of BP alone, the Crown Landing project is the catalyst for this proceeding and information concerning that project arguably could be relevant in providing further context. To the extent extrinsic evidence is found necessary to construe the Compact, a comparison of the proposed LNG facility to past projects possibly could be of some relevance in evaluating the states' contentions regarding the meaning of the Compact.

The only remaining issue is whether there is some alternative public source from which Delaware could obtain the requested materials that would avoid unnecessary discovery costs, as New Jersey suggests. Mindful of the states' mutual interest in avoiding unnecessary discovery costs, and in light of the apparent public availability of at

least a significant portion of the documents related to the Crown Landing project, the Order below sets forth the approach that the states are to follow. The Special Master assumes that the states will continue to work together cooperatively in this regard, as they have to date in this litigation, to avoid disputes in following the approach set forth in this Order.

6. *Delaware's Proposed Issue of Fact No. 9*: New Jersey's motion to strike is granted.

Delaware seeks discovery pertaining to whether BP has "obtained all necessary New Jersey government permits for the Crown Landing project," in order to determine "whether the case is ripe and, therefore, whether this Court has jurisdiction over the dispute." (Def. Opp. to Motion to Strike Issues of Fact at 25.)

New Jersey has alleged in response that, because Delaware has asserted jurisdiction over the BP project and has declined to permit BP to conduct sediment sampling from the Delaware River that is necessary for permitting under New Jersey's regulations, New Jersey is unable to complete any review of the BP proposal as a result of Delaware's actions. Under Delaware's theory, then, New Jersey's claim would never fully ripen as a result of Delaware's assertion of jurisdiction over the BP project. Under those circumstances, the matter is ripe for review in this original action.

In addition, for the reasons set forth in Section 2 above, New Jersey itself is a real party in interest by virtue of its claim that Delaware inappropriately is attempting to regulate matters on New Jersey's shores. Thus, discovery concerning whether BP has already obtained permits from New Jersey for the development of

the Crown Landing facility cannot lead to the production of admissible evidence relevant to the issues involved in this original action.

CONCLUSION

For the foregoing reasons, after full consideration of the states' written submissions and following oral argument by counsel, it is hereby ORDERED that:

New Jersey's Motion to Strike Delaware's Proposed Issues of Fact Nos. 1, 2, 6, 8 and 9 and to Preclude Discovery on These Issues is GRANTED IN PART AND DENIED IN PART, as follows:

The Motion is GRANTED as to Delaware's Issues of Fact Nos. 1, 2 and 9;

The Motion is DENIED as to Delaware's Issues of Fact Nos. 6 and 8; and

With respect to Delaware's Issue of Fact No. 8: Delaware shall first attempt to obtain the documents it seeks from public sources. New Jersey shall help Delaware in identifying the locations of such public documents, to the extent Delaware is not already aware of such filings. Once Delaware has obtained the requested documents from public sources, it will then be entitled to obtain from New Jersey any remaining requested documents that are not publicly available and that reasonably bear on this issue.

Dated: June 13, 2006

/s/ Ralph I. Lancaster, Jr.
Ralph I. Lancaster, Jr.
Special Master

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APPENDIX E
New Jersey's Index of Evidentiary Materials
Volume I

Page

Documents Relating to the Compact of 1905

Delaware Joint Resolution, February 13, 1905 ..... 1a

23 Del. Laws Ch. 6 (1905) 2a

Laws of the State of Delaware 1905, Appendix 7a

Compact of 1905 (23 Del. Laws Ch. 5 (1905) 8a

Compact of 1905 as enacted by Congress, January 24, 1907 ..... 14a

Documents relating to the 1935 Decree, *New Jersey v. Delaware II*

Decree, No. 11 Orig., June 3, 1935 ..... 18a

***New Jersey v. Delaware I* transcript (extracts)**

Transcript of proceedings, pages 305-312 ..... 25a

Transcript of proceedings, pages 240-241 ..... 33a

Transcript of proceedings, pages 244-245 ..... 35a

Transcript of proceedings, page 260 ..... 37a

Transcript of proceedings, pages 272-283 ..... 38a

Transcript of proceedings, pages [sic] 168 ..... 50a

Transcript of proceedings, pages 133-134 ..... 51a

Transcript of proceedings, pages 155-156 ..... 53a

Transcript of proceedings, pages 242-245, (Exhibit 35 *Daniel H. Kent* Riparian grant 1883) 55a

Transcript of proceedings, pages 256-265, (Exhibit 37 *Dupont* Riparian grant 1891) 59a

Transcript of proceedings, pages 266-271 (Exhibit 38 *Annie E. Brown* Riparian grant 1891)..... 68a

Transcript of proceedings, pages 60-78 ..... 74a

Documents Related to and Predating Compact of 1905

Correspondence between the Governors of New Jersey and Delaware: May 9, 14, 22, 1872..... 94a

New Jersey v. Delaware I. Order for Preliminary Injunction. March 26, 1877 ..... 99a

Report of Commissioners of New Jersey, March 16, 1903 ..... 102a

Letter Report from Delaware Commissioners, March 28, 1903 ..... 105a

Letter from Delaware Commissioner Ward to Delaware Commissioner Bates, February 11, 1905 ..... 108a

Letter to New Jersey Governor Stokes, December 19, 1905 ..... 110a

Letter from the Secretary Of State of Delaware, December 21, 1905 ..... 111a

Resolution passed by the Joint Commission on January 16, 1907 (with cover letter) 112a

Letter from Delaware Attorney General, January 19, 1907 ..... 114a

Documents Related to *New Jersey v. Delaware II*

Reply Brief of Defendant Before Special Master pages 6-11 ..... 121a

Oral argument by Delaware before Special Master pages 90-93 ..... 125a

Report of the Special Master pages 52-55, 76-77 and 80 ..... 128a

Brief for Plaintiff on Exceptions to the Report of the Special Master pages 126-131 ..... 133a

Reply Brief of Defendant pages 7-11, 16 and 17, 26-29 ..... 137a

Documents Related to New Jersey's Opening Statement and Sherman Testimony, *New Jersey v. Delaware II* (excerpts)

Transcript of proceedings, pages 77-87 ..... 143a

Transcript of proceedings, pages 106-111 ..... 149a

Transcript of proceedings, pages 114-115 ..... 153a

Transcript of proceedings, pages 116-123 ..... 155a

Volume II

Documents Related to New Jersey's Opening Statement and Sherman Testimony, *New Jersey v. Delaware II* (excerpts) (continued)

Transcript of proceedings, pages 126-129 ..... 159a

Transcript of proceedings, pages 130-155 ..... 161a

Transcript of proceedings, pages 270-285 ..... 174a

Correspondence Related to Decision, *New Jersey v. Delaware II*

Letter from Duane Minard N.J. Assistant Attorney General to Hon. Clarence Southerland, Delaware Special Counsel, April 17, 1935 ..... 182a

Letter from Clarence Southerland to Delaware Attorney General Green, April 18, 1935 ..... 184a

Letter from Delaware Attorney General Green to the Governor of Delaware, December 27, 1938 ..... 186a

Report by Clarence Southerland for Delaware Attorney General, July 3, 1935..... 190a

New Jersey Laws

Wharf Act of 1851, 1851 N.J. Laws ch..335 ..... 206a

Legislative Grant to *Thomas D. Broadway.* 1854 N.J. Laws ch. 143 .....211a

Act to Incorporate the *Pennsgrove Pier Company.* 1855 N.J. Laws ch. 274 ..... 214a

Board of Riparian Commissioners Law, 1864 N.J. Laws ch. 391 ..... 217a

Report of Commissioners, February 1, 1865..... 220a

General Riparian Act, 1869 N.J. Laws ch. 383..... 232a

Legislative Grant to *Robert Walker.* 1870 N.J. Laws ch. 131 ..... 240a

Legislative Grant to *Joseph Guest.* 1870 N.J. Laws ch. 344 ..... 241a

1871 N.J. Laws ch. 256 ..... 242a

Legislative Grant to *Henry Barber.* 1871 N.J. Laws ch. 307 ..... 243a

Proclamation by the Governor of New Jersey, May 8, 1872..... 245a

Joint Resolution by New Jersey Legislature, 1876 N.J. Laws p. 418, March 30, 1876 ..... 247a

1891 N.J. Laws ch. 123 ..... 249a

1903 N.J. Laws, p. 39: Joint Resolution Relating to the Boundary Controversy Between the States of New Jersey and Delaware, March 5, 1903 ..... 254a

1903 N.J. Laws ch. 243: Act to Ratify a Compact, April 8, 1903 ..... 256a

1905 N.J. Laws ch. 42: Act to Ratify and Confirm the 1905 Compact, March 21, 1905 ..... 262a

1905 N.J. Laws ch. 230: Act to Appoint Three Commissioners by New Jersey, May 11, 1905 ..... 268a

1905 N.J. Laws ch. 131: Act to provide uniform laws regarding fishing, May 7, 1907 ..... 273a

Waterfront Development Law, 1914 N.J. Laws ch. 123 (now codified in part as N.J.S.A. §12:5-1 et seq.) 283a

New Jersey Board of Commerce and Navigation Permit to William Acton, 1923 and 1925 ..... 290a

1915 N.J. Laws ch. 242: New Jersey Board of Commerce and Navigation Act 292a

1917 N.J. Laws ch. 189: New Jersey Cession to United States Government 298a

New Jersey Attorney General Opinions and Related Correspondence

NJ Atty Gen. Op. 3 (1954), February 2, 1954 ..... 302a

Letter from Chief Deputy Attorney General of Delaware to Mr. Gannon, Chief of New Jersey Navigation Bureau, June 13, 1955 and Reply of June 19, 1955 ..... 305a

Letter from Mr. Friedman of New Jersey Navigation Bureau to Delaware Chief Deputy Attorney General, August 2, 1956 ..... 307a

NJ Atty Gen. Op. 22 (1956), November 16, 1956 ..... 308a

Volume III

Delaware Laws

Wilmington Ordinance, approved July 16, 1884 ..... 313a

40 Del. Laws ch. 179 (1935) (Wilmington boundaries), approved April 11, 1935 ..... 314a

Wilmington City Code, effective July 1, 1993 (portion) 319a

Delaware Attorney General Opinions on Fishing Laws and Delaware Governor's 1909 Message

State of Delaware, Biennial Message of Preston Lea, Governor, January 5, 1909 (portion) 356a

Del. Atty Gen. Op. 33 (1977), October 28, 1977 ..... 360a

Delaware Attorney General letter, September 11, 1946 ..... 362a

Castagana Affidavit

Affidavit of Richard G. Castagna, June 27, 2005 ..... 369a

New Jersey State Tidelands Grants

Daniel H. Kent grant, 1883 ..... 386a

Annie E. Brown grant, 1891 ..... 392a

Dupont grant, 1891 ..... 399a

James A. Denny grant, 1906 ..... 404a

Pennsgrove Pier Company grant, 1916 ..... 412a

Harry S. Barber grant, 1916 ..... 419a

Dupont grant (9 tracts), August 21, 1916 ..... 427a

Dupont grant, November 20, 1916 ..... 439a

Dupont grant, 1917 ..... 445a
Dupont lease, 1918 ..... 450a
French's Hotel Company grant, 1921 ..... 457a
Acton grant, February 27, 1923 ..... 463a
Acton grant, November 22, 1923 ..... 468a
Lease to Fogg and Hires Company, 1924 ..... 473a
Delaware-New Jersey Ferry Company grant 1930 ..... 482a
Acton grant, August 17, 1925, (Liber H-1 p. 81) 486a
Acton grant, August 17, 1925, (Liber K-1 p. 58) 491a
Township of Lower Penns Neck grant, 1925 ..... 496a
Acton grant, October 19, 1925 ..... 501a
The Franklin Real Estate Company grant, 1928 ..... 506a
Anna C. B. Locuson grant, 1929 ..... 511a

Volume IV

Josephine Grace Locuson grant, April 15, 1929 (Liber Q-1 p. 155) 516a
Josephine Grace Locuson grant, April 15, 1929 (Liber Q-1 p. 149) 521a
William G. Locuson grant, June 17, 1929 ..... 526a
Josephine Grace Locuson grant, 1929 ..... 531a
Dupont grant, 1929 ..... 538a
Delaware River Power Company Lease, 1929 ..... 543a
Penn Beach Property Owners' Association grant, 1933 ..... 549a
J. Landis Strickler grant, 1935 ..... 554a
Dupont grant, 1943 ..... 559a

Sun Oil Company grant, 1957 ..... 565a

Dupont grant, 1960 ..... 575a

Dupont grant, 1967 ..... 582a

Keystone Urban Renewal Limited Partnership lease, 1992 ..... 589a

William G. Bergman license, 2001 (renewal)..... 610a

Township of Pennsville Revocable license, 2000..... 616a

New Jersey Parks Assignment of Management Rights, 1999 ..... 622a

Documents Relating to E. I. du Pont de Nemours and Company

Letter of W.G. Ramey, Vice President of DuPont, to B.F. Cresson, Jr., Chief Engineer, New Jersey Board of Commerce and Navigation, September 11, 1916 ..... 632a

Letter of B.F. Cresson, Jr. Consulting Engineer, New Jersey Board of Commerce and Navigation to C.R. Mudge, Esq. of Legal Department of Dupont, November 7, 1917 ..... 633a

Letter of Mr. Cresson to Mr. Mudge, November 8, 1917 ..... 634a

Letter of Mr. Cresson to Mr. Mudge, November 12, 1917 ..... 635a

Letter of Alan L. Skinner, of Counsel to R.A. Haber, Chief Engineer, Delaware Highway Department, September 30, 1957 ..... 636a

Letter of Mr. Haber to Mr. Skinner October 25, 1957 ..... 638a

Letter of S. Samuel Arst, Counsel to the State Highway Department to Mr. Haber, December 2, 1957 ..... 639a

Letter of Mr. Haber to Army Corps. of Engineers, December 13, 1957 Letter of Edward T. Fogg, Engineer of Dupont to B. E. Lane of D.N.R.E.C., May 12, 1971 ..... 642a

Letter of Mr. Fogg to Mr. Lane, June 7, 1971 ..... 648a

Letter of Richard H. Schlein, Delaware Deputy Attorney General to Hon., Russell W. Peterson, Governor of Delaware, September 23, 1971 ..... 650a

New Jersey Permit for Dupont, March 1, 1977 ..... 657a

New Jersey Permit to Dupont, August 1977 ..... 658a

Acceptance of Revocable Permit, September 19, 1977 ..... 660a

New Jersey Stream Encroachment Permit Application Acknowledgment, October 25, 1977 ..... 661a

Memorandum from Mike Malkiewicz to Bill Moyer (of Delaware), September 4, 1981 ..... 662a

Memorandum from Mike Malkiewicz to Bill Moyer, September 10, 1981 ..... 663a

Delaware Lease to Dupont, September 29, 1971 ..... 664a

Memorandum from William Moyer to June MacArtor (Delaware DAG), January 15, 1982 ..... 670a

Letter of Deputy Attorney General MacArtor of Delaware to Mr. Skinner of Dupont, October 23, 1981 ..... 671a

Project Summary of Chambers Works Proposal, 1982 ..... 672a

Acceptance of Revocable Permit, April 8, 1982 and Coastal Permit, March 24, 1982 ..... 676a

New Jersey Water Allocation Permits

Affidavit of Frederick Sickels, June 22, 2005 ..... 683a

New Jersey Water Allocation Permit to Logan Generating Company, November 13, 1996..... 688a

Cogentrix Water Allocation Permit Renewal Application, September 29, 2005..... 698a

New Jersey Surface Water Discharge Permits and Enforcement

Jeffrey T. Redding Affidavit, June 23, 2005..... 710a

Volume V

New Jersey Surface Water Discharge Permits and Enforcement (cont.)

Cogentrix N.J.P.D.E.S. Permit Renewal Application, March 3, 2005..... 718a

Letter of N.J.D.E.P. Division of Water Quality to Mr. Donnelly of D.N.R.E.C., March 29, 2006..... 758a

Dupont Administrative Consent Order, June 28, 1989..... 761a

Dupont Administrative Consent Orders, February 8, 1988 and December 14, 1984..... 770a

Connectiv Power Administrative Order, June 7, 2001..... 777a

Pennsville Sewerage Authority Administrative Order, June 16, 1988..... 785a

Pennsville Sewerage Authority Administrative Consent Order, June 29, 1991..... 794a

Penns Grove Sewerage Authority Consent Order, May 12, 1999..... 803a

Logan Generating Plant Discharge Permit Field Compliance and Assistance Report, August 26, 1978 ..... 810a

Logan Generating Plant Settlement Agreement, January 4, 1996 ..... 811a

Broderick Affidavit and Waterfront Development Permits, With Delaware Correspondence

Affidavit of Kevin Broderick, June 2005 ..... 817a

Dupont Chambers Works New Jersey Waterfront Development Permit, October 18, 1982 ..... 824a

Dupont Chambers Works New Jersey Waterfront Development Permit, January 20, 1988 ..... 827a

Keystone Cogeneration System New Jersey Waterfront Development Permit, September 24, 1991 ..... 830a

Keystone Cogeneration Systems Inc. Summary Analysis, September 24, 1991 ..... 837a

Logan Generating Company Water Quality Certificate, September 14, 1998 ..... 870a

Pennsville Township New Jersey Permit, March 22, 2000 ..... 876a

Pennsville Township New Jersey Permit, February 20, 2001 ..... 879a

Fort Mott State Park Permit, January 24, 1996 ..... 882a

Letter from Fenwick Commons' Counsel to D.N.R.E.C. Secretary Hughes, May 6, 2005 ..... 885a

Decision by Secretary Hughes re: Riverwalk Project, March 10, 2005 ..... 886a

Delaware Actions – El Paso

Letter from David R. Keifer, Director, Delaware Planning Office to N.J.D.E.P. Commissioner Sullivan, February 17, 1972 ..... 887a

Letter from Mr. Keifer to Mr. Barry Huntsinger, Vice President of El Paso Eastern Company, February 23, 1972 ..... 888a

Letter from Commissioner Sullivan to Mr. Keifer, March 2, 1972 ..... 891a

Letter from Mr. Huntsinger, to Mr. Keifer, March 3, 1972 ..... 892a

Letter from Mr. Keifer to Mr. Huntsinger, March 17, 1972 ..... 893a

Coastal Zone Management Documents

The Coastal Zone of Delaware, July 1972 (excerpts) ... 895a

Comments of Sun Oil Company on the Proposed Delaware Coastal Management Plan, August 9, 1979 ..... 932a

Affidavit of Steven C. Whitney, July 27, 2005 ..... 936a

DuPont Dredging Permit Issued by New Jersey, Sept. 16, 1977 ..... 939a-1

Volume VI

State of New Jersey Coastal Management Program Bay and Ocean Shore Segment Draft Environmental Impact Statement, May 1978 (portion) 940a

Options for New Jersey's Developed Coast Appendices A-G, March 1979 (portions) 1024a

New Jersey Coastal Management Program Final Environmental Impact Statement, August 1980.... 1057a

Letter from Mr. Whitney of N.J.D.E.P. to Anthony P. Pratt of D.N.R.E.C. re: Keystone Cogeneration Systems, March 14, 1991 ..... 1067a

Draft Memorandum of Agreement, November 15, 1993 ..... 1068a

Letter of Delaware Administrator Cooksey to Terrie Fowler, Planner, N.J.D.E.P. re: Draft Memorandum of Agreement, May 9, 1994 ..... 1074a

Draft Memorandum of Agreement, June 16, 1994 ..... 1076a

Newspaper Articles Regarding Compact

Every Evening – Wilmington, Delaware, March 10, 1905 "The Boundary Question" (p. 4) 1081a

Every Evening – Wilmington, Delaware, March 10, 1905 "The Boundary Question" (p. 6) 1083a

Every Evening – Wilmington, Delaware, March 11, 1905 Statement by Mr. H.H. Ward 1086a

Every Evening – Wilmington. Delaware. March 15, 1905 Editorial 1088a

Every Evening – Wilmington, Delaware, March 15, 1905 News report 1090a

Every Evening – Wilmington, Delaware, March 15, 1905 "The Boundary Battle" 1092a

Every Evening – Wilmington, Delaware, March 15, 1905 News report "Boundary Dispute" 1103a

Every Evening – Wilmington, Delaware, News report "Boundary Settlement Compact is Signed" 1108a

Pre-*New Jersey v. Delaware III* Correspondence

Letter of New Jersey Governor's Chief Counsel, Paul T. Fader to Joseph Schoell, Legal Counsel to Delaware Governor, April 11, 2005.....1109a

Letter of Mr. Schoell to Mr. Fader, May 9, 2005.....1112a

New Jersey Assembly Resolution No. 260, Assembly Committee Substitute – adopted May 2, 2005...1114a

Volume VII

Request for Admissions (Delaware's Response) and September 19, 2006 Letter

Delaware's Responses to New Jersey's First Request for Admissions September 8, 2006 .....1117a

Letter of Mr. Collins J. Seitz to Deputy Attorney General Rachel J. Horowitz, September 19, 2006...1189a

Expert Reports

Richard Castagna, *New Jersey's Exercise of Regulatory Authority Over Waterfront Improvements In The Twelve Mile Circle Outshore of Low Water.* November 9, 2006.....1193a

J. Richard Weggel, Ph.D., P.E., *Trends in Shipping. Dredging Technology and in Wharf and Pier Construction in the Years Surrounding 1905 with Emphasis on the Delaware River and Bay.* November 7, 2006..... 1224a

Treatises

Farnham, *The Law of Waters and Water Rights.* Vol. I (1904) (excerpts)..... 1279a

Additional Miscellaneous Documents

Letter of David Q. Risilia, N.J.D.E.P., to David Blaha, Environmental Resources Management, October 19, 2005 ..... 1296a

Letter of Janis Farmer of Crown Landing to Mr. Risilia, April 10, 2006 ..... 1298a

Letter of S. Samuel Arsht, Department Attorney, Delaware Highway Department, to Alan L. Skinner of Dupont, January 8, 1958 ..... 1299a

Letter of Mr. Skinner to John C. Bryson of D.N.R.E.C., February 10, 1971 ..... 1300a

Letter of Mr. Skinner to Delaware Deputy Attorney General June D. MacArtor, October 27, 1981 ..... 1303a

Letter of Herbert Ward, Delaware Attorney General, to Delaware Governor Hunn, January 31, 1903 ..... 1305a

Joint Resolution of New Jersey Legislature, February 14, 1905 ..... 1315a

Webster's Unabridged Dictionary (1898) (excerpts)... 1319a

Letter of Delaware Attorney General to Delaware Special Counsel Southerland, April 25, 1935 ..... 1319a

Opinion of Delaware Attorney General, February 8, 1968 ..... 1320a

Volume VIII

Affidavit of Craig A. Reiner, August 29, 2006 ..... 1322a

Affidavit of Carl W. Wentzell, August 30, 2006 ..... 1325a

Affidavit of J. Thomas Butts, September 5, 2006 ..... 1329a

Declaration of Beth S. Reddy, October 2, 2006 ..... 1334a

Memo to Colonel Justin J. Dinto Superintendent of State Police, from Philip H. Hopkins, Jr., Counsel to The New Jersey Attorney General, April 30, 1993 ..... 1340a

Letter to Mr. Hugh R. Sharp, Chairman State Highway Department, from Delaware Attorney General Joseph Craven, May 31, 1955 ..... 1347a

Letter to John C. Bryson, Executive Director, Delaware Water and Air Resources Commission, from James L. Lachum, Esq., Berl, Potter & Anderson, September 9, 1966 ..... 1349a

Letter to Juan S. Crofton, Crofton Diving Corp., from Frank J. Cianfrani, Chief Regulatory Branch, US Army Corps of Engineers, June 24, 1988 ..... 1359a

Letter to Sarah W. Cooksey, Administrator, Delaware Coastal Management Program, from Thomas McVeigh, Principal Project Manager, Roy F. Weston, Inc., February 21, 2001 ..... 1362a

Coastal Zone Management for Delaware, February 18, 1971 (Excerpt) 1367a

Delaware Bay Report Series, Volume 8, Economic and Social Aspects of Delaware's Coastal Zone, Spring 1973 (Excerpt) 1408a

Delaware's Responses to New Jersey's First Set of Interrogatories, June 30, 2006 ..... 1471a

Delaware's Response to New Jersey's First Request for Production of Documents, June 30, 2006 ..... 1501a

Henry Philip Farnham, The Law of Water and Water Rights, 1904 (Excerpt), §114 ..... 1516a

Letter to David Blaha, Environmental Resources Management, from Joseph J. Seebode, Assistant Commissioner, NJDEP, May 24, 2005 ..... 1525a

Letter to Magalie R. Salas, Secretary, Federal Energy Regulatory Commission from Kenneth C. Koschek, Office of Permit Coordination and Environmental Review, NJDEP, May 25, 2005 ..... 1527a

Volume IX

Letter to Magalie R. Salas, Secretary, Federal Energy Regulatory Commission from Suzanne Dietrich, NJDEP, June 13, 2005 ..... 1529a

APPENDIX F
Delaware's Index of Evidentiary Materials

TABLE OF CONTENTS
VOLUME 1

PAGE

Compact between the State of New Jersey and the State of Delaware (Mar. 21, 1905) (signed manuscript, on file with Delaware Public Archives, Hall of Records) 1

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 New Jersey-Delaware Compact) 11

New Jersey v. *Delaware I* Pleadings:

Partial Record, *New Jersey v. Delaware*, No. 1, Original (1877) (printed in 1897 by The John L. Murphy Publishing Co., Trenton, NJ) 15

Plaintiff's Motion for Writ of Preliminary Injunction, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Mar. 19, 1877) 77

Points Submitted by the Defendant in Opposition to the Motion of Complainant for a Writ of Preliminary Injunction, *New Jersey* v. *Delaware*, No. 1, Original (U.S. filed Mar. 19, 1877) 85

Order of Continuance, *New Jersey* v. *Delaware*, No. 1, Original (U.S. Oct. 12, 1897) 91

Plaintiff's Notice on Bill for Injunction and Relief, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Mar. 22, 1901) 93

Defendant's Answer, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Oct. 15, 1901) 95

Notice of Motion, Motion, and Brief for Defendant on Motion for Order of Reference, *etc.*, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Apr. 30, 1903) 163

Notice of Intention to Call Up Motion, *New Jersey* v. *Delaware*, No. 1, Original (U.S. filed May 15, 1903) 169

Joint Stipulation, *New Jersey* v. *Delaware*, No. 1, Original (U.S. filed May 28, 1903) 171

Order of Continuance, *New Jersey* v. *Delaware*, No. 1, Original (U.S. Jan. 3, 1905) 175

Letter of Special Master regarding filing of Interlocutory Report, *New Jersey v. Delaware*, No. 1, Original (Jan. 11, 1906) 177

Materials from *New Jersey v. Delaware*, No. 1, Original (U.S. filed Feb. 1906) (including Interlocutory Report of Commissioner, Stipulation, Proposed Order, and Joint Statement of Reasons for Suspension of Proceedings) 181

Plaintiff's Motion for Directions to Special Master, *New Jersey* v. *Delaware*, No. 1, Original (U.S. filed Sept. 14, 1906) 193

Affidavit of Robert H. McCarter in support of Plaintiff's Motion, *New Jersey v. Delaware*, No. 1, Original (U.S. filed Sept. 15, 1906) 197

New Jersey v. *Delaware II* Pleadings:

Plaintiff's Bill of Complaint, *New Jersey v. Delaware*, No. 19, Original (U.S. filed June 3, 1929) 199

Defendant's Answer to Complaint, *New Jersey v. Delaware*, No. 19, Original (U.S. filed Oct. 9, 1929) 217

Order granting New Jersey's Motion for Appointment of Special Master, *New Jersey v. Delaware*, No. 19, Original (U.S. Jan. 6, 1930) 274

Deposition Transcripts – Delaware Witnesses:

David P. Blaasch (Oct. 26, 2006) 275

Philip J. Cherry (Oct. 20, 2006) 289

Laura M. Herr (Oct. 18, 2006) 305

Robert W. Hutchins (Oct. 26, 2006) 325

William F. Moyer (Oct. 18, 2006) 339

Kurt Reuther (Oct. 5, 2006) 393

William F. Streets (Sept. 26, 2006) 419

Deposition Transcripts – New Jersey Witnesses:

Kevin Broderick (Sept. 27, 2006) 445

Richard G. Castagna (Oct. 24, 2006) 481

Suzanne Dietrick (Oct. 13, 2006) 539

Ruth E. Ehinger (Oct. 23, 2006) 577

James R. Johnson (Nov. 1, 2006) 619

Martin J. McHugh (Oct. 11, 2006) 651

Beth S. Reddy (Oct. 20, 2006) 679

David Q. Risilia (Oct. 4, 2006) 707

Carl W. Wentzell (Oct. 20, 2006) 751

Steven Whitney (Oct. 10, 2006) 771

VOLUME 2

Acts, Votes and Proceedings, Correspondence, Reports, Resolutions of the 47th New Jersey General Assembly, Trenton (Nov. 7, 1820 – Apr. 16, 1929) 811

Letter from Jacob Stout to the Delaware General Assembly (Jan. 5, 1821) 857

New Jersey v. Delaware, No. 1, Original (Plaintiffs Exhibit No. 37) 1821 N.J. Laws p. 6 (Nov. 21, 1821) 859

New Jersey v. Delaware, No. 1, Original (Plaintiffs Exhibit No. 38) 1823 N.J. Laws p. 36 (extract) (Nov. 28, 1822) 861

New Jersey v. *Delaware,* No. 1, Original (Plaintiffs Exhibit No. 162) "Delaware Laws Relating to New Jersey Delaware Boundary Dispute" (1852-1927) 863

Compact between the State of New Jersey and the State of New York, 4 Stat. 708 (1834) 885

New Jersey v. Delaware, No. 1, Original (Plaintiffs Exhibit No. 39) 1846 N.J. Laws Apr. 10, 1846) 889

Commissioners of the State of New Jersey, Report on Lands Under Water (1864) 891

Opinion Concerning Riparian Rights, Hon. George M. Robeson, Attorney General of New Jersey (Mar. 15, 1867) 905

An Act for the Protection of Fishermen (Mar. 28, 1871) 913

Third Annual Report of the Commissioners of Fisheries of the State of New Jersey (1872) 917

Correspondence between Joel Parker, Governor of New Jersey and James Ponder, Governor of Delaware (May 1872) 927

Journal of the Senate of the State of New Jersey, pp. 46-49 (Jan. 14, 1873) 933

Journal of the Senate of the State of New Jersey, pp. 504-07 (Mar. 5, 1873) 937

Supplement to An Act for the Protection of Fishermen (Feb. 19, 1873) 943

Journal of the Senate of the State of New Jersey, pp. 1134-37 (Feb. 27, 1873) 945

Journal of the Senate of the State of New Jersey, pp. 514-15 (Mar. 5, 1873) 949

Journal of the Senate of the State of New Jersey, pp. 554-55 (Mar. 10, 1873) 951

Journal of the Senate of the State of New Jersey, pp. 590-91 (Mar. 12, 1873) 953

Letter from the Attorney General of New Jersey (Oct. 2, 1873) 955

Delaware Commissioners' Decision on the Fishery Question (July 2, 1874) 963

Report of the Governor to Legislature, Joseph D. Bedle, Governor of New Jersey (Mar. 2, 1876) 983

Seventh Annual Report of the Commissioners of Fisheries of the State of New Jersey (1876) 987

15 Del. Laws chs. 501-04 (1877) 993

New Jersey v. Delaware, No. 1, Original (Plaintiffs Exhibit No. 40) 1881 N.J. Laws p. 367 (Feb. 7, 1881) 999

Report on the Dividing Line between the Delaware River and Bay, John P. Stockton (Aug. 12, 1885 – Jan. 3, 1888) 1003

Annual Report of the Commissioners of Fisheries of the State of New Jersey (Dec. 31, 1885) 1011

Annual Report of John P. Stockton, Attorney General of New Jersey (Jan. 3, 1888) 1017

Final Report of New Jersey State Geologist (1888) 1041

Letter from Suther Hewitt to Geo Bates (Sept. 23, 1898) 1053

Opinion, H. H. Ward, Attorney General of Delaware (Feb. 14, 1901) 1055

New Jersey-Delaware Boundary Suit, New York Times at 6 (Apr. 9, 1901) 1063

John Hunn, Governor of Delaware, Message to Delaware General Assembly and Joint Resolution of the Delaware General Assembly (Jan. 31, 1903) 1065

Letter from Franklin Murphy, Governor of New Jersey, to the New Jersey Legislature (Mar. 3, 1903) 1081

Minutes of the New Jersey General Assembly, pp. 422-25 (Mar. 3, 1903) 1085

Journal of the Senate of the State of New Jersey, pp. 234-35 (Mar. 3, 1903) 1091

Journal of the Senate of the State of New Jersey, pp. 237-38 (Mar. 3, 1903) 1093

To Fix State Boundary Line, Newark Evening News (Mar. 4, 1903) 1097

Delaware Fishermen Don't Ask Jerseymen to be Kept Off River, The Evening Journal, at 1 (Mar. 4, 1903) 1099

Journal of the Senate of the State of Delaware, pp. 896-903 (Mar. 16, 1903) 1103

Minutes of the New Jersey General Assembly, pp. 549-50 (Mar. 16, 1903) 1109

Delaware and Jersey's Pact, Newark Evening News (Mar. 17, 1903) 1113

Pages Deliberately Left Blank 1115

Letter from Commissioners of the State of Delaware to Commissioners of the State of New Jersey (Mar. 28, 1903) 1117

Letter from Herbert H. Ward, Attorney General of Delaware, to George H. Bates (Apr. 1903) 1121

Letter from the Attorney General of New Jersey to George H. Bates (Apr. 2, 1903) 1123

Letter to John Hunn, Governor of Delaware (Apr. 6, 1903) 1125

Letter from Herbert H. Ward, Attorney General of Delaware, to George H. Bates (May 1903) 1127

Letter from Herbert H. Ward, Attorney General of Delaware, to George H. Bates (May 1903) 1129

Letter to Herbert H. Ward, Attorney General of Delaware (June 9, 1903) 1131

Opening Statement on Behalf of Complainant by the Attorney-General of New Jersey, *New Jersey v. Delaware,* No. 1 Original (Nov. 7, 1903) 1133

Letter from Herbert H. Ward, Attorney General of Delaware, to Francis Rawle (Apr. 23, 1904) 1149

Letter from Herbert H. Ward, Attorney General of Delaware, to Robert H. McCarter (Apr. 23, 1904) 1151

Letter to Judge William C. Spruance (Nov. 23, 1904) 1153

King James Deed Shown Delaware Jersey Dispute, Trenton Times (Feb. 4, 1905) 1159

Letter from Herbert H. Ward, Attorney General of Delaware, to George H. Bates (Feb. 11, 1905) 1163

Plan to Settle the Boundary Dispute, Evening Journal (Feb. 11, 1905) 1165

24 Del. Laws ch. 216(1905) 1169

Joint Resolution of the New Jersey Senate and General Assembly Appointing Governor Edward C. Stokes, Attorney General Robert H. McCarter, Franklin Murphy, and Chauncy G. Parker Commissioners of the State of New Jersey (Feb. 14,1905) 1171

Compact between the State of New Jersey and the State of Delaware, H.R. Doc. No. 43 (approved by the Delaware Legislature, Mar. 20, 1905) 1173

Letter from Robert H. McCarter, Attorney General of New Jersey, to Edward C. Stokes, Governor of New Jersey (Mar. 8, 1906) 1177

Compact between the State of New Jersey and the State of Delaware, S. Doc. No. 260 (approved by the New Jersey Legislature, Mar. 21, 1905) 1179

S. 4975, 59th Cong. (1906) (ratified) (Mar. 13, 1906) 1190

Letter from Joseph L. Cahall, Secretary of State, Delaware, to Hiram R. Burton (Dec. 21, 1905) 1197

Letters from John B. Avis, Secretary, New Jersey Commissioners, to W. H. Hayes (Dec. 13, 1905 – Dec. 19, 1905) 1198

Letter from Robert H. McCarter, Attorney General of New Jersey, to Joseph L. Cahall, Secretary of State, Delaware (May 9, 1905) 1214

Report on New Jersey and Delaware Fisheries of the Commissioners of the State of New Jersey (1905) 1216

Letter from John B. Avis, Secretary, New Jersey Commission, to Joseph L. Cahall, Secretary of State, Delaware (Aug. 7, 1905) 1219

Letter from William S. Hilles, Secretary, Delaware Commissioners, to Hiram R. Burton, U.S. House of Representatives (Mar. 14, 1906) 1221

Letter from John B. Avis, Secretary, New Jersey Commissioners, to E. C. Stokes, Governor of New Jersey (Dec. 19, 1905) 1223

Resolution of Delaware and New Jersey Commissions (Dec. 15, 1905) 1225

Letter from Robert H. Richards, Attorney General of Delaware, to Hiram Burton, U.S. House of Representatives (Jan. 19, 1907) 1227

Telegram from Congressman Loudenslager to E. C. Stokes, Governor of New Jersey (Mar. 14, 1906) 1229

Notes re: phone call with Congressman Loudenslager (Undated) 1231

Letter from E. C. Stokes, Governor of New Jersey, to Congressman Loudenslager (Mar. 14, 1906) 1233

Letter from William J. Bradley to Alexander B. Cooper, President Delaware & New Jersey Fisheries Compact Commission (Mar. 19, 1906) 1235

Letters between Geo H. Bates and Robert H. McCarter (Mar. 22, 1906 – Mar. 23, 1906) 1239

Letter to Alexander B. Cooper, Esq. (Mar. 24, 1906) 1242

Letter from Alexander B. Cooper to Walter H. Hayes, Esq. (May 2, 1906) 1246

Letter from Robert H. Richards, Attorney General of Delaware, to the Chairman of the Judiciary Committee, U.S. House of Representatives (Jan. 19, 1907) 1248

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (June 18, 1906) 1253

Letter from Francis Rawle to Robert H. Richards, Attorney General of Delaware (Jan. 16, 1906) 1255

Letter from Robert H. Richards, Attorney General of Delaware, to George H. Bates (Jan. 17, 1906) 1257

Letter from George Bates to Robert H. McCarter, Attorney General of New Jersey (Feb. 22, 1906) 1259

Letter to Robert H. Richards, Attorney General of Delaware (Feb. 22, 1906) 1261

Letter from J. C. Sandford, Major, Corps of Engineers, to Brig. Gen. A. Mackenzie, Chief of Engineers, U.S.A. (Mar. 10, 1906) 1263

Letter and attachment from J. C. Sandford, Major, Corps of Engineers, to Brig. Gen. A. Mackenzie, Chief of Engineers, U.S.A. (Mar. 16, 1906) 1267

Letter from William H. Taft, Secretary of War, to Robert Bacon, U.S. Secretary of State (Mar. 27, 1906) 1273

Letter from Robert Bacon, U.S. Secretary of State, to William H. Taft, Secretary of War, (Mar. 29, 1906) 1275

Letter from Edward C. Stokes, Governor of New Jersey, to Elihu Root, U.S. Secretary of State (Apr. 2, 1906) 1277

Letter from J. C. Sandford, Major, Corps of Engineers, to Edward C. Stokes, Governor of New Jersey (Dec. 20, 1906) 1279

Letter from C. B. F. Flagler, Major, Corps of Engineers, to Edward C. Stokes, Governor of New Jersey (May 11, 1907)..... 1283

Letter from the Secretary to Edward C. Stokes, Governor of New Jersey, to C. B. F. Flagler, Major, Corps of Engineers (May 23, 1907)..... 1287

Letter from C. B. F. Flagler, Major, Corps of Engineers to the Secretary to Edward C. Stokes, Governor of New Jersey (May 25, 1907)..... 1289

Telegram from J. Frank Allee to Walter H. Hayes (Mar. 14, 1906)..... 1291

Pages 1293-1834: Documents Relating to the Joint Fisheries Commission 1905-1908

Letter from Alexander B. Cooper, President, and William S. Hilles, Delaware Commissioners, to Robert H. Richards, Attorney General of Delaware (Jan. 19, 1907)..... 1293

Letter from Robert H. McCarter, Attorney General of New Jersey, to Edward C. Stokes, Governor of New Jersey (Jan. 9, 1906)..... 1295

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 9, 1907)..... 1297

Letter from Senator William J. Bradley, New Jersey to Alexander B. Cooper, President, Delaware Commissioners (Jan. 9, 1907)..... 1299

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 7, 1907)..... 1301

Report of the Proceedings of the Public Meetings Held by the Commissioners of the State of Delaware (Delaware-New Jersey Fisheries Compact)..... 1303

VOLUME 3

Delaware Commissioners Delaware – New Jersey Fisheries Compact Minute Book, 1905-1908 (Apr. 1, 1905-1908) 1525

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Senator William J. Bradley, New Jersey (Jan. 5, 1907) 1733

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Oct. 2, 1906) 1735

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 8, 1907) 1737

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 14, 1907) 1739

Letter from Robert H. McCarter, Attorney General of New Jersey, to R. Wayne Parker, U.S. House of Representatives (Jan. 15, 1907) 1740

Report of Delaware Commissioners on Delaware and New Jersey Fisheries Compact; Preliminary Report of the Commission for the Investigation of Salt Water Fishing; and Facts Concerning the Menhaden Industry Along the Atlantic Coast (Feb. 2, 1907, Mar. 12, 1906, and Undated) 1741

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Sept. 26, 1907) 1770

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Dela.vare Commissioners (May 4, 1908) 1772

Report of Inspector J.H. Avis (Aug. 11, 1908) 1774

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (July 2, 1907) 1779

Letter from Percey Warren Green, Attorney General of Delaware, to S. Rusling Leap, New Jersey State Senator (Feb. 20, 1935) 1780

Letter from Clarence A. Southerland to C. Douglass Buck, Governor of Delaware (May 1, 1935) 1783

Letter from Percey Warren Green, Attorney General of Delaware, to Dr. George H. Ryden, Archives Commission (Oct. 8, 1937) 1784

Description of Boundary Line in Delaware Bay between Delaware and New Jersey, Proposal B 1786

Description of Boundary Line in Delaware Bay between Delaware and New Jersey, Proposal A 1787

Discussion of the Boundary Line in Delaware Bay between Delaware and New Jersey 1788

Chronological List of Delaware Boundary Commissions 1791

Agreement between Commissioners of the State of Delaware and Commissioners of the State of New Jersey (Oct. 1, 1906) 1795

Laws of the State of Delaware Relating to Fishing in the Delaware River and Bay (1871-1905) 1799

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (June 4, 1908) 1816

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (June 27, 1908) 1818

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (July 8, 1908) 1820

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (July 17, 1908) 1823

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (July 21, 1908) 1825

Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Aug. 14, 1908) 1827

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Aug. 28, 1908) 1829

Joint Resolution of the New Jersey General Assembly (May 6, 1929) 1831

Brief on Behalf of the Informant-Respondent, by Robert H. McCarter, Attorney General of New Jersey, *Hudson County Water Co. v. McCarter*, No. 184 (U.S. filed Feb. 25, 1907) 1835

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Feb. 28, 1907) 1871

Letter from Alexander B. Cooper, President, Delaware Commissioners, to Walter H. Hayes, Secretary, Delaware Commissioners (Mar. 2, 1907) 1873

Letter to Walter H. Hayes, Secretary, Delaware Commissioners (Mar. 7, 1907) 1876

24 Del. Laws ch. 146 (1906-07) 1879

Pages 1891-2024: Documents Relating to the Joint Fisheries Commission 1914-1939

Letter from John W. Wescott, Attorney General of New Jersey, to Herbert H. Ward (July 3, 1914) 1891

House Joint Resolution of the Delaware General Assembly (Feb. 3, 1915) 1896

Legislative History of New Jersey-Delaware Compact 1897

33 Del. Laws ch. 193 (1923) 1901

New Jersey Board of Fish and Game Commissioners, Historical Chronology, July 1, 1922 – June 30, 1931) 1917

Letter from George S. Silzer, Governor of New Jersey, to William D. Denney, Governor of Delaware (Apr. 4, 1924) 1921

Letter from William D. Denney, Governor of Delaware, to Edward I. Edward, Governor of New Jersey (Mar. 12, 1921) 1924

Letter from William D. Denney, Governor of Delaware, to George S. Silzer, Governor of New Jersey (Feb. 25, 1924) 1926

Telegram from William D. Denney, Governor of Delaware, to George S. Silzer, Governor of New Jersey (Feb. 25, 1924) 1928

Letter from George S. Silzer, Governor of New Jersey, to William D. Denney, Governor of Delaware (Feb. 26, 1924) 1930

Letter from William D. Denney, Governor of Delaware, to George S. Silzer, Governor of New Jersey (Mar. 13, 1924) 1932

Letter from George S. Silzer, Governor of New Jersey, to William A. Logue (Mar. 25, 1924) 1935

Letter from Jere E. Chambers to George S. Silzer, Governor of New Jersey (Mar. 31, 1924) 1937

Letter from J. M. Stratton, Protector, New Jersey Board of Fish and Game Commissioners, to George S. Silzer, Governor of New Jersey (Mar. 31, 1924) 1939

Act to Amend Chapter 74 of the Revised Code of Delaware (Undated) 1944

Letter from Harris Samonisky to Robert P. Robinson, Governor of Delaware (Apr. 4, 1927) 1947

Letter from Harris Samonisky to Robert P. Robinson, Governor of Delaware (Apr. 4, 1927) 1949

Memorandum Relative to Controversy Respecting Fishing in the Delaware River (May 6, 1938) 1953

Letter from H. J. Burlington to Mr. Solan (May 24, 1938) 1956

Letter from B. S. Quadling and C. J. Gehring, Fortescue Captains' Association, Inc., to A. Harry Moore, Governor of New Jersey (May 27, 1938) 1959

Letter from Thelma A. Parkinson to A. Harry Moore, Governor of New Jersey (June 1, 1938) 1961

Editor, *Fisherman Complains,* Evening News (Undated) 1963

Letter to David T. Wilentz, Attorney General of New Jersey (June 15, 1938) 1965

Appointment of P. Warren Green as Member of Delaware Commission to Study Uniform Laws Relative to Fishing (June 23, 1938) 1968

Letter from Richard C. McMullen, Governor of Delaware, to P. Warren Green, Attorney General of Delaware (June 17, 1938) 1971

Letter from P. Warren Green, Attorney General of Delaware, to Charles L. Terry, Secretary of State, Delaware (June 28, 1938) 1973

Letter from New Jersey Board of Fish and Game Commissioners, to A. Harry Moore, Governor of New Jersey (June 6, 1938) 1977

Letter from Richard C. McMullen, Governor of Delaware, to P. Warren Green, Attorney General of Delaware (June 24, 1938) 1979

Letter from A. Harry Moore, Governor of New Jersey, to Richard C. McMullen, Governor of Delaware (June 29, 1938) 1981

Letter from Charles L. Terry, Secretary of State, Delaware, to P. W. Green, Attorney General of Delaware (Aug. 5, 1938) 1983

Letter from P. W. Green, Attorney General of Delaware, to Charles L. Terry, Secretary of State, Delaware (Aug. 9, 1938) 1985

Letter from Percey Warren Green, Attorney General of Delaware, to Delaware Game and Fish Commission (Aug. 18, 1938) 1987

Letter from George C. Warren, New Jersey Board of Fish and Game Commissioners, to A. Harry Moore, Governor of New Jersey (Feb. 14, 1939) 1992

Final Report of the New Jersey Board of Fish and Game Commissioners (Feb. 14, 1939) 1997

Letter from John Solan to Chas Besore (Undated) 2001

S. 201, State of New Jersey (introduced, Feb. 27, 1939) 2003

Letter from Attorney General of Delaware to Delaware Board of Game and Fish Commissioners (Sept. 11, 1940) 2017

Letter from Walter H. Bacon, Esq. to George S. Silzer, Governor of New Jersey (Dec. 7, 1925) 2025

Walter H. Bacon, New Jersey-Delaware Boundary Line (Dec. 7, 1925) 2026

Letter from George S. Silzer, Governor of New Jersey, to Edward L. Katzenbach, Attorney General of New Jersey (Dec. 30, 1925) 2045

Letter from Edward L. Katzenbach, Attorney General of New Jersey, to George S. Silzer, Governor of New Jersey (Jan. 4, 1926) 2046

Letter from George S. Silzer, Governor of New Jersey, to Robert P. Robinson, Governor of Delaware (Dec. 29, 1925) 2047

Third Annual Message of New Jersey Governor George S. Silzer to the Legislature of New Jersey (transcript at 14-15) (Jan. 12, 1926) 2050

Letter from George S. Silzer, Governor of New Jersey, to Robert P. Robinson, Governor of Delaware (Jan. 18, 1926) 2054

35 Del. Laws ch. 243 (1927) 2055

Journal of the Senate of the State of New Jersey, pp. 812-14 (Mar. 17, 1927) 2057

Letter from Clarence A. Southerland, Attorney General of Delaware, to Robert P. Robinson, Governor of Delaware (Dec. 26, 1928) 2061

Letter from Commissioners of the State of Delaware to C. Douglass Buck, Governor of Delaware (Apr. 29, 1929) 2063

Letter from Robert H. Richards to Walter H. Bacon (Dec. 27, 1928) 2069

Letter from Robert H. Richards to Robert P. Robinson, Governor of Delaware (Dec. 27, 1928) 2071

Letter from Robert H. Richards to Robert P. Robinson, Governor of Delaware (Dec. 27, 1928) 2073

Letter from Robert P. Robinson, Governor of Delaware, to Capt. Jas. W. Wilcutts (Dec. 28, 1928) 2075

Letter from Robert P. Robinson, Governor of Delaware, to Robert H. Richards (Dec. 28, 1928) 2077

Letter from William A. Stevens, Attorney General of New Jersey, to Morgan F. Larson, Governor of New Jersey (June 21, 1929) 2079

William A. Stevens, Attorney General of New Jersey, Report Concerning Delaware River Diversion Case, Beach Pollution Case, New Jersey-Delaware Boundary Case (June 21, 1929) 2081

Delaware Gets Wharfage on Jersey Shore, Evening Journal, at 1 (Feb. 6. 1934) 2095

Letter from Duane E. Minard to S. Rusling Leap, New Jersey State Senator (May 2, 1934) 2098

Letter from Duane E. Minard to S. Rusling Leap, New Jersey State Senator (July 20, 1934) 2101

Letter from Clarence A. Southerland to P. Warren Green, Attorney General of Delaware (Feb. 12,1935) 2105

U.S. Supreme Court Finally Fixes Del.-Jersey Boundary, Evening Journal, at 25 (June 4, 1935) 2108

Letter from Clarence A. Southerland to Percey Warren Green, Attorney General of Delaware (Apr. 18,1935) 2111

Letter from Duane E. Minard to Clarence A. Southerland (Apr. 17, 1935) 2112

Letter from Percey Warren Green, Attorney General of Delaware, to Clarence A. Southerland (Apr. 29, 1935) 2114

Letter from Clarence A. Southerland to Percey Warren Green, Attorney General of Delaware (July 3, 1935) 2116

Letter from Percey Warren Green, Attorney General of Delaware, to Richard C. McMullen, Governor of Delaware (Dec. 27, 1938) 2132

40 Del. Laws ch. 119(1935) 2137

Letter from Harold G. Hoffman, Governor of New Jersey, to C. Douglass Buck, Governor of Delaware (Apr. 16, 1935) 2141

Letter from S. Rusling Leap, New Jersey State Senator, to Percey Warren Green, Attorney General of Delaware (Feb. 7, 1935) 2147

Letter from Percey Warren Green, Attorney General of Delaware, to Clarence A. Southerland (Feb. 8, 1935) 2149

Letter from S. Rusling Leap, New Jersey State Senator, to Percey Warren Green, Attorney General of Delaware (Feb. 11, 1935) 2152

Letter from S. Rusling Leap, New Jersey State Senator, to Percey Warren Green, Attorney General of Delaware (Mar. 1, 1935) 2154

Letter from S. Rusling Leap, New Jersey State Senator, to Percey Warren Green, Attorney General of Delaware (Apr. 5, 1935) 2155

Letter from Percey Warren Green, Attorney General of Delaware, to S. Rusling Leap, New Jersey State Senator (Apr. 6, 1935) 2157

40 Del. Laws ch. 179 (1935) 2159

House Substitute for House Bill No. 164 (Del. 1935) (Apr. 12, 1935) 2164

Letter from C. Douglass Buck, Governor of Delaware, to Robert H. Richards (Apr. 24, 1935) 2167

Letter from S. Rusling Leap, New Jersey State Senator, to Percey Warren Green, Attorney General of Delaware (May 17, 1935) 2169

Letter from Percey Warren Green, Attorney General of Delaware, to S. Rusling Leap, New Jersey State Senator (May 18, 1935) 2171

Letter from Percey Warren Green, Attorney General of Delaware, to C. Douglass Buck, Governor of Delaware (June 10, 1935) 2173

Letter from Clarence A. Southerland to C. Douglass Buck, Governor of Delaware (July 8, 1935) 2175

Letter from Secretary to C. Douglass Buck, Governor of Delaware, to Percey Warren Green, Attorney General of Delaware (July 11, 1935) 2177

Letter from Clarence A. Southerland to Bella A. Stroud, Secretary to C. Douglass Buck, Governor of Delaware (July 15, 1935) 2179

Letter from Clarence A. Southerland to Percey Warren Green, Attorney General of Delaware (Sept. 23, 1935) 2181

Letter from Percey Warren Green, Attorney General of Delaware, to John C. H. Lee, Lieut. Col., Corps of Engineers, U. S. Engineer Office (Sept. 24, 1935) 2185

Letter from John C. H. Lee, Lieut. Col., Corps of Engineers, U.S. Engineers Office, to Percey Warren Green, Attorney General of Delaware (Sept. 26, 1935) 2186

Letter from Percey Warren Green, Attorney General of Delaware, to John C. H. Lee, Lieut. Col., Corps of Engineers, U. S. Engineer Office (Oct. 1, 1935) 2187

Letter from Percey Warren Green, Attorney General of Delaware, to C. Douglass Buck, Governor of Delaware (Oct. 3, 1935) 2188

Letter from Percey Warren Green, Attorney General of Delaware, to Clarence A. Southerland (Oct. 17, 1935) 2189

Letter from T. G. Hilliard to Percey Warren Green, Attorney General of Delaware (Oct. 28, 1935) 2191

Letter from Percey Warren Green, Attorney General of Delaware, to T. G. Hilliard (Nov. 9, 1935) 2193

Letter from T. G. Hilliard to Percey Warren Green, Attorney General of Delaware (Sept. 24, 1936) 2195

Letter from T. G. Hilliard to Percey Warren Green, Attorney General of Delaware (Oct. 7, 1936) 2197

Letter from Percey Warren Green, Attorney General of Delaware, to C. R. Mudge (Feb. 11, 1937) 2199

Letter from Edward W. Cooch, Lieut. Governor of Delaware, to Percey Warren Green, Attorney General of Delaware (Mar. 9, 1937) 2201

Report of Commissioners, State of Delaware (Mar. 4, 1937) 2202

Reply Brief of Defendant on Exceptions to Report of Special Master, *New Jersey* v. *Delaware*, Nos. 13 & 19, Original 2207

Stipulated Record Testimony, *New Jersey* v. *Delaware*, No. 13, Original 2253

Riparian Grant A 2261

Riparian Grants B & C 2263

Diagram 2267

Riparian Grant H 2269

Riparian Grants P & Q 2273

Riparian Grant V 2277

Legislative Grant 1c 2279

VOLUME 4

Coastal Management Plan Documents

New Jersey Department of Environmental Protection ("NJDEP"), New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Draft Environmental Impact Statement (May 1978) (excerpts) 2281

NJDEP, New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Final Environmental Impact Statement (Aug. 1978) (excerpts) 2307

Delaware Office of Management, Budget & Planning, Discussion Draft of the Delaware Coastal Management Program (Sept. 1978) (excerpts) 2331

NJDEP, Options for New Jersey's Developed Coast (Mar. 1979) 2383

National Oceanic & Atmospheric Administration, U.S. Department of Commerce ("NOAA"), Delaware Coastal Management Program and Final Environmental Impact Statement (Mar. 1980) 2519

NJDEP, Proposed New Jersey Coastal Management Program and Draft Environmental Impact Statement (May 1980) (excerpts) 2607

NOAA, New Jersey Coastal Management Program and Final Environmental Impact Statement (Aug. 1980) 2627

Letter from John King, NOAA, to Heather Gibbons, Connolly Bove Lodge & Hutz LLP (Nov. 29, 2006)... 3171

VOLUME 5

Memorandum of Agreement Documents

Draft Memorandum of Agreement between NJDEP and Delaware Department of Natural Resources and Environmental Control ("DNREC") (Oct. 18, 1993)..... 3173

Draft Memorandum of Agreement between NJDEP and DNREC (Oct. 28, 1993)..... 3179

Draft Memorandum of Agreement between NJDEP and DNREC (Nov. 5, 1993) 3187

Draft Memorandum of Agreement between NJDEP and DNREC (June 16, 1994) 3201

Inter-Office Memorandum and attachments from Lawrence J. Baier to Steven C. Whitney, NJDEP (Oct. 29, 1991)..... 3207

Inter-Office Memorandum and attachments from Rick Sinding to Management Team, NJDEP (Nov. 1, 1991)..... 3229

Inter-Office Memorandum and attachments, from Steven Whitney to Management Team, NJDEP (July 7, 1994)..... 3237

Handwritten Notes and attached Oct. 28, 1993 Draft Memorandum of Agreement between NJDEP and DNREC (Undated)..... 3249

Handwritten Notes and attached Oct. 28, 1993 Draft Memorandum of Agreement between NJDEP and DNREC (Undated)..... 3257

Inter-Office Memorandum and attachment, from Terry Fowler to Steven Whitney NJDEP (Aug. 3, 1993) 3265

Handwritten Note and attachment to Steven Whitney, NJDEP (Oct. 28, 1991) 3277

Email from Ruth Ehinger to Dorina Frizzera (July 18, 1994) 3281

Email from Terry Fowler to Ruth Ehinger (July 19, 1994) 3283

Email from JoAnn Cubberly to Steven Whitney (July 20, 1994) 3285

Letter from Helen C. P. Grady, NOAA, to Dorina Frizzera, NJDEP (July 17, 1996) 3287

Handwritten Notes (Undated) 3295

Handwritten Notes (May 26, 1994) 3301

Email from Terry Fowler to Ruth Ehinger (July 19, 1994) 3303

Handwritten Notes (Jan. 12, 1994) 3305

Email to Steven Whitney (Nov. 5, 1993) 3307

Memorandum of Agreement between NJDEP and DNREC, Division of Coastal Resources and the New Jersey Pinelands Commission (Feb. 8, 1988) ... 3309

Handwritten Notes (Undated) 3313

Email from Steven Whitney to Ruth Ehinger (May 7, 1993) 3315

Email from Ruth Ehinger to Dorina Frizzera (July 18, 1994) 3317

Permit-Related Documents

Pipelines

Twenty-year Subaqueous Lands Lease between the State of Delaware and SunOlin Chemical Company (Jan. 11, 1962) 3319

Ten-year Subaqueous Lands Lease between the State of Delaware and Colonial Pipeline Company (Oct. 9, 1963) 3323

Renewal of Subaqueous Lands Lease (SL-0508/81) issued to SunOlin Chemical Company (Nov. 14, 1981) 3331

DNREC Subaqueous Lands Lease (SL-0203/87) issued to Colonial Pipeline Company (1987) 3337

Burlco Engineering Associates Application for a Request For A Coastal Zone Status Decision for Colonial Pipeline Company to DNREC (Jan. 8, 1987) 3345

Letter from William F. Moyer, DNREC, to T. H. Norris, Colonial Pipeline Co. DNREC (July 21, 1987) 3349

DNREC Subaqueous Lands Lease (SL-0204/87) issued to Columbia Gas Transmission Corporation (July 28, 1987) 3351

DNREC Subaqueous Lands Lease (SL-0203/87) issued to Colonial Pipeline Company (Aug. 3, 1987) 3357

Memorandum from Charles A. Lesser, DNREC, to Bill Moyer, DNREC (Aug. 11, 1987) 3363

Memorandum from Charles A. Lesser, DNREC, to Bill Moyer, DNREC (Sept. 17, 1987) 3365

Letter from William F. Moyer, DNREC, to J. R. Arnold, Colonial Pipeline Company (Sept. 24, 1987)..... 3367

Letter from William F. Moyer, DNREC, to J. R. Arnold, Colonial Pipeline Company (Mar. 8, 1988)..... 3369

Renewal of Subaqueous Lands Lease (SL-1203/91) issued to Sun Refining and Marketing Company (Oct. 15, 1991)..... 3371

DNREC Subaqueous Lands Lease (SL-1310/94) issued to Colonial Pipeline Company (Oct. 9, 1994)..... 3375

Letter from James Chaconas, DNREC, to Colonial Pipeline (Dec. 23, 1994)..... 3381

DNREC amended water allocation permit issued to Logan Generating Company, L.P. (No. 91-0012M2) (Jan. 13, 1995)..... 3383

Letter from Jennifer Cross, DNREC, to Paul Wagner, P.E., U.S. Generating Company (Jan. 21, 1998)..... 3387

Renewal of Subaqueous Land Lease (SL-404/01, a renewal of SL-1203/91) to Sunoco Inc. (May 15, 2002)..... 3389

DuPont

Letter from B.E. Lane, DNREC, to P.H. Collins, DuPont (Jan. 29, 1971)..... 3395

Letter from B.E. Lane, DNREC, to Col. Carroll D. Strider, U.S. Army Corps of Engineers (Jan. 29, 1971)..... 3397

Letter from John C. Bryson, DNREC, to Laird Stabler, Attorney General of Delaware (Feb. 19, 1971)..... 3399

Letter from B.E. Lane, DNREC, to James Kelly, U.S. Army Corps of Engineers (Apr. 5, 1971)..... 3401

Delaware Subaqueous Lands Lease (SL-558/1971) issued to DuPont (Sept. 29, 1971) 3403

Letter from George Cassedy, DuPont, to James Johnson, NJDEP (July 13, 1977)..... 3409

Application Form for Stream Encroachment Permit from DuPont to NJ Div. of Water Resources (Oct. 11, 1977)..... 3413

Letter Receipt of Stream Encroachment Permit Application Form from NJDEP to DuPont (Oct. 25, 1977)..... 3427

Letter of Authorization from William F. Moyer, DNREC, to Lewis A. Caccese, P.E., S. T. Hudson Engineers, Inc. (Mar. 18, 1982)..... 3429

Letter from William F. Moyer, DNREC, to J. Curry, DuPont (Oct. 15, 1982)..... 3431

Letter of Authorization from William F. Moyer, DNREC, to William N. Malin, S. T. Hudson Engineers, Inc. (Jan. 5, 1987)..... 3433

Letter from William F. Moyer, DNREC to Reinhold Betschel, DuPont (Feb. 9, 1988) 3435

DNREC Subaqueous Lands Permit (SP-071/01) issued to DuPont (May 4, 2001)..... 3439

Technical Briefing Meeting Agenda, Treatment and Disposal of Neutralized VX at DuPont Chambers Works (Mar. 10,2004) 3445

Letter from Ruth Ann Minner, Governor of Delaware and James E. McGreevey, Governor of New Jersey, to Les Brownlee, Secretary of the Army (Apr. 7, 2004) 3447

Letter from John A. Hughes, DNREC to Jesse L. Barber, Colonel, Newport Chemical Stockpile Outreach Office (Apr. 19, 2004) 3449

Letter from Kevin Donnelly, DNREC, to Bernard Reilly, DuPont (May 19, 2004) 3453

DNREC Subaqueous Lands Permit issued to DuPont to dredge at the Chamber Works Facility (Mar. 7, 2006) 3455

Letter from John Hughes, DNREC, to Alan Muller, Green Delaware (Mar. 29, 2006) 3461

El Paso

Letter from El Paso Eastern Company to David R. Keifer, Director of Delaware State Planning Commission (Dec. 21, 1971) 3469

Letter from David Keifer, Director of Delaware State Planning Commission, to W. Laird Stabler, Attorney General of Delaware (Dec. 29, 1971) 3473

Letter from David Keifer, Director of Delaware State Planning Commission, to Barry Huntsinger, El Paso Eastern Company (Dec. 29, 1971) 3475

Letter from W. Laird Stabler, Attorney General of Delaware, to David Keifer, Director of Delaware State Planning (Jan. 20, 1972) 3477

Memo from David Keifer, Director of Delaware State Planning Commission, to Russell Peterson, Governor of Delaware (Feb. 16, 1972) 3479

Letter from David Keifer, Director of Delaware State Planning Commission, to Richard Sullivan, Commissioner of NJDEP (Feb. 17, 1972) 3481

Letter from David Keifer, Director of Delaware State Planning Commission, to Barry Huntsinger, El Paso Eastern Company (Feb. 23, 1972) 3483

Letter from Richard Sullivan, Commissioner, NJDEP, to David Keifer, Director of Delaware State Planning Commission (Mar. 2, 1972) 3485

Letter from Barry Hunsaker, El Paso Eastern Company, to David Keifer, Director of Delaware State Planning Commission (Mar. 3, 1972) 3487

Letter from David Keifer, Director of Delaware State Planning Commission, to Barry Hunsaker, El Paso Eastern Company (Mar. 17, 1972) 3489

Report on Coastal Zone Act Administration, June 28, 1971 – June 30, 1977, DE State Coastal Zone Industrial Control Board (Nov. 1977) 3491

Keystone

Letter from John A. Hughes, DNREC to George Franklin, Sun Refining and Marketing Co. (Undated) 3503

Letter from Edward H. Clark, DNREC, to Richard V. Ciliberti, Keystone Cogeneration Systems, Inc. (Nov. 19, 1990) 3505

DNREC Coastal Zone Status Decision, CZA Project No. 2375D (Nov. 19, 1990) 3507

Letter from Steven Whitney, NJDEP, to Anthony P. Pratt, DNREC (Mar. 14, 1991) 3511

Letter from James Johnson, NJDEP, to Richard Long, S. T. Hudson Engineers, Inc. (Aug. 1, 1991) ... 3513

NJDEP Memorandum from Robert Tudor to James Johnson (Aug. 28, 1991) 3515

NJDEP Summary Analysis of Keystone waterfront development permit application (Sept. 24, 1991)..... 3517

NJDEP permit to Keystone for waterfront development (Sept. 24, 1991) 3549

DNREC Subaqueous Lands Lease and attached application form issued to Keystone Cogeneration Systems, Inc. (Sept. 30, 1991) 3557

Application Form of Keystone Cogeneration Systems, Inc. for Subaqueous Lands Permit (Sept. 30, 1991)..... 3563

Letter from Tracy Skrabal, DNREC, to Keystone Cogeneration Systems (Oct. 7, 1991) 3601

DNREC Industrial Water Allocation Permit issued to Keystone Cogeneration Systems, Inc. (No. 91-0012) (Oct. 17, 1991) 3603

DNREC Coastal Zone Permit issued to Keystone Cogeneration Systems, Inc. (Dec. 13, 1991)..... 3607

DNREC Supplemental Lease Approval granted to Keystone Energy Service Company, L.P. (Apr. 6, 1992)..... 3609

DNREC Supplemental Lease Approval granted to Keystone Energy Service Company, L.P. (May 28, 1993)..... 3611

Letter from Robert J. Taggert, DNREC, to R. V. Ciliberti, Keystone Energy Service Company (Sept. 2, 1994)..... 3613

DNREC Notice of Authorization issued to Keystone Energy Service Company, L.P. (Sept. 30, 1994)..... 3615

DNREC Supplemental Lease Approval granted to Keystone Energy Service Company, L.P. (Jan. 6, 1995)..... 3617

Letter from James T. Chaconas and William F. Moyer, DNREC, to Janine Kelly, Logan Generating Company, L.P. (Mar. 15, 1995) 3619

Letter from William F. Moyer and Laura M. Herr, DNREC, to Logan Generating Company, L.P. (Keystone) (Nov. 12, 1997) 3621

DNREC Subaqueous Lands Lease and attached application form issued to Logan Generating Company, L.P. (Nov. 9,2001) 3623

Letter from Sarah W. Cooksey, DNREC, to Thomas W. Lomm, PG&E National Energy Group (Mar. 14,2002) 3629

Fort Mott

NJDEP Division of Parks and Forestry Land Use Regulation Program Application JDEP for Fort Mott Pier renovation (Sept. 19, 1995) 3631

Map of proposed Fort Mott Pier renovation (Sept. 13, 1995) 3649

DNREC Subaqueous Lands Lease Application and Letter of Authorization Request to NJDEP for Fort Mott Pier Rehabilitation Project (Sept. 20, 1995) 3651

Letter from Faye L. Stocum, DNREC, to Frank J. Cianfrani, U.S. Army Corps of Engineers (Nov. 14, 1995) 3709

Letter from Sarah W. Cooksey, DNREC, to Lawrence R. Horan, S. T. Hudson Engineers, Inc. (Dec. 15, 1995) 3711

Letter from William F. Moyer, DNREC, to NJDEP, Dept. of Parks and Forestry (Jan. 4, 1996) 3713

DNREC Subaqueous Lands Lease (SL-1110/95) issued to the State of New Jersey Department of Environmental Protection Division of Parks and Forestry (Feb. 7, 1996) 3715

NJDEP Permit issued to NJDEP Div. of Parks and Forestry (Jan. 24, 1996) 3723

Letter from Mark R. Chura, DNREC, to Carl Nordstrom, NJDEP (Apr. 4, 1996) 3727

Letter from Carl Nordstrom, NJDEP Division of Parks and Forestry, to David Hazelton, Delaware River & Bay Authority (Mar. 6, 1997) 3729

New Jersey State Park Service Subaqueous Lands Lease Renewal Application (Aug. 16,2006) 3731

DNREC Memorandum from Wetlands and Subaqueous Lands Section to DNREC Distribution List (Dec. 13, 2006) 3735

Delmarva Power

Letter from William Moyer, DNREC, to Moira Donoghue, Delmarva Power & Light Co. (Apr. 6, 1987) 3739

Joint application of Delmarva Power & Light Co. to DNREC for subaqueous lands, wetlands, and marina projects (May 17, 1997) 3741

DNREC Subaqueous Lands Lease (SL-0109/97) issued to Delmarva Power & Light Co. (Dec. 9, 1997) 3755

Letter from Sarah W. Cooksey, DNREC, to Juan S. Crofton, Crofton Diving Corp. (Feb. 24, 1998) 3761

DNREC Supplemental Lease Approval granted to Conectiv Communications, Inc. (Mar. 11,2002) 3763

Salem River

Letter from William Moyer, DNREC, to Roy Denmark, U.S. Army Corps of Engineers (Apr. 12,1991)..... 3765

Letter from William Moyer and Tracy Skrabal, DNREC, to H. Ronald Kreh, U.S. Army Corps of Engineers (Apr. 7, 1992)..... 3767

Letter from William Moyer to H. Ronald Kreh, U.S. Army Corps of Engineers (Apr. 27, 1992)..... 3769

Letter from Robert Callegari, U.S. Army Corps of Engineers, to David Carter, DNREC (Mar. 10,1994)..... 3771

Letter from William Moyer, DNREC, to U.S. Army Corp of Engineers (Dec. 15, 1994)..... 3773

Letter from William Moyer and James Chaconas, DNREC, to U.S. Army Corps of Engineers (Dec. 15, 1994)..... 3775

Letter from Sarah Cooksey, DNREC, to U.S. Army Corps of Engineers (Jan. 10, 1995)..... 3777

Marcus Hook

Letter from Sarah Cooksey, DNREC, to Thomas McVeigh, Roy F. Weston, Inc. (Mar. 7, 2001)..... 3779

Letter from Sarah Cooksey, DNREC, to Thomas McVeigh, Roy F. Weston, Inc. (Mar, 7, 2001)..... 3781

Letter from Sarah Cooksey, DNREC, to Sonny Rutkowski, Weston Solutions, Inc. (July 30, 2003)..... 3783

VOLUME 6

BP Crown Landing

Permit Application Letter from Golder Associates, Inc. to DNREC (Sept. 27, 2004) 3785

Letter from Laura Herr, DNREC, to Lauren Segal, BP Crown Landing LLC (Oct. 29, 2004) 3789

Letter from Robert Stetkar, P.E., Golder Associates, to DNREC (Nov. 4, 2004) 3791

Letter from David Swayze, Parkowski, Guerke, & Swayze, to John Hughes, Secretary, DNREC (Dec. 7, 2004) 3793

Letter from John Hughes, Secretary, DNREC, to Lauren Segal, Crown Landing LLC (Feb. 3, 2005) 3811

Decision and Order, *In re Coastal Zone Status Decision on the Application of Crown Landing LLC*, No. CZ 2005-01 (Coastal Zone Industrial Control Board of the State of Delaware Apr. 14, 2005) 3813

Sandia National Laboratories, *Guidance on Risk Analysis and Safety Implication of a Large Liquefied Natural Gas (LNG) Spill Over Water* (Dec. 2004) (excerpts) 3831

DNREC Subaqueous Lands Lease (SL-312/04) issued to Fenwick Commons, LLC (May 10, 2005) 3839

FERC, Final Environmental Impact Statement – Crown Landing LNG and Logan Lateral Projects, Docket Nos. CP04-411-000 & CP04-416-000 (Apr. 2006) (excerpts) 3845

Letter from David S. Swayze, Parkowski, Guerke & Swayze, to Hon. John A. Hughes, Secretary, DNREC (Dec. 7, 2004) 3863

BP Request to DNREC for a Coastal Zone Status Decision (Nov. 30, 2004) (excerpts) 3865

Del. Op. Att'y Gen. 78-018 (1978) 3881

Photographs of Structures in the Delaware River 3885

Aerial photographs referenced in New Jersey's Castagna Expert Report (Nov. 9, 2006) 3979

Map of Fire Company Districts 3997

Emergency Response Reports Showing Transferred Calls 3999

Summary of Delaware River Emergency Response Calls Received by Department of Public Safety, Emergency Communications Division, New Castle County, Delaware (July 3, 1994 – Sept. 18,2006) 4003

DNREC Air and Waste Management Complaint Files (Aug. 18, 2006) 4015

Delaware Water and Air Resources Commission, Regulations Governing the Use of Water Resources and Public Subaqueous Lands, Regulation IV (adopted July 14, 1969) 4023

DNREC, Regulations Governing the Use of Subaqueous Lands (adopted May 8, 1991, amended Sept. 2, 1992) 4025

Joint Agreement between the State of New Jersey and the State of Delaware (Aug. 29, 2001) 4049

Amendment Replacing Exhibit C of the 2001 Joint Agreement between the State of New Jersey and the State of Delaware (Feb. 22, 2005) 4055

Expert Report of Carol E. Hoffecker, Ph.D. (Nov. 9, 2006) 4059

Expert Report of Professor Joseph L. Sax (Nov. 7, 2006) 4123

New Jersey's Responses to Delaware's First Requests for Admissions (Sept. 8, 2006) 4147

State v. Mick, Crim. Nos. 83-05-0092 (Del. Super. Ct. May 2, 1984) 4189

Webster's International Dictionary (1898) (excerpts) ... 4193

Letter and attachment from David R. Keifer, Director of Delaware State Planning Commission, to Barry Huntsinger, El Paso Eastern Company (Feb. 23, 1972) 4201

Aerial photographs with boundary lines 4207

VOLUME 7

Expert Reports and Affidavits

Expert Report of Carol E. Hoffecker, Ph.D. (Nov. 9, 2006) 4213

Expert Report of Professor Joseph L. Sax (Nov. 7, 2006) 4279

Affidavit of Philip Cherry 4303

Affidavit of Sarah Cooksey 4311

Affidavit of R. Peder Hansen 4319

Affidavit of Laura M. Herr 4323

Affidavit of Robert Hutchins 4339

Affidavit of Ali Mirzakhalili 4345

Affidavit of William Moyer 4349

Affidavit of Kurt Reuther 4359

Affidavit of William S. Schenck 4371

Affidavit of David M. Small 4375

Affidavit of William Streets 4381

VOLUME 8

Interstate Compact Documents:

N.J.S.A. §§ 52:28-23 to -28 (Compact between the State of New Jersey and the State of Pennsylvania (Apr. 26, 1783)) 4401

Reply Brief of the State of New Jersey in Opposition to the Exceptions of the State of New York, *New Jersey v. New York*, No. 120, Original (U.S. filed Aug. 29, 1997) 4407

N.J.S.A. 32:11E-1 (Delaware-New Jersey Compact of 1961, as amended) 4433

New Jersey v. Delaware II Pleadings:

Stipulated Record, Testimony, Volume 1, *New Jersey v. Delaware*, No. 18, Original (U.S.) (excerpts) 4447

Stipulated Record, Descriptive List of Exhibits, Volume II, *New Jersey v. Delaware*, No. 18, Original (U.S.) (excerpts) 4455

Plaintiff's Brief Before the Special Master, *New Jersey v. Delaware*, No. 19, Original (U.S. filed Aug. 15, 1932) (excerpts) 4529

Stenographer's Record, Oral Argument Before the Special Master, *New Jersey v. Delaware*, No. 19, Original (U.S. Sept. 12, 1932) 4539

Coastal Management Plan Documents:

Busemann, *Energy Facility Siting Issues in New Jersey's Coastal Zone: A Staff Working Paper*, New Jersey Department of Environmental Protection ("NJDEP"), Division of Marine Services, Office of Coastal Zone Management (December 1977) 4599

NJDEP, New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Draft Environmental Impact Statement (May 1978) (excerpts) 4619

NJDEP, New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Final Environmental Impact Statement (Aug. 1978) (excerpts) 4627

NJDEP, Proposed New Jersey Coastal Management Program and Draft Environmental Impact Statement (May 1980) (excerpts) 4635

Crown Landing Documents:

Letter from David Q. Risilia, NJDEP Office of Dredging & Sediment Technology, to David Blaha, Environmental Resources Management (Feb. 4, 2005) 4641

Letter from Kenneth Koscheck, NJDEP Office of Permit Coordination & Environmental Review, to Magalie R. Salas, Federal Energy Regulatory Commission (Apr. 19, 2005) 4673

Letter from Joseph J. Seebode, Assistant Commissioner, NJDEP to David Blaha, Environmental Resources Management (May 24, 2005) 4683

Discovery Documents:

BP, plc., Privilege Log: Common Interest Communications, (April 25, 2006) (Exhibit A to Declaration of Stuart A. Raphael) 4685

Responses to Plaintiff State of New Jersey to First Set of Interrogatories from Defendant State of Delaware, *New Jersey v. Delaware*, No. 134, Original (July 14, 2006) 4713

VOLUME 9

Henry Campbell Black, M.A., *A Dictionary of Law Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (St. Paul, MN, West Publishing Co. 1891) 4747

Fish Lines Cause a Stir, Daily State Gazette (Trenton, NJ) Mar. 17, 1903 4749

Case Runs 30 Years, The Washington Post, Feb. 26, 1906 4751

Henry C. Conrad, *History of the State of Delaware* (1908) (excerpts) 4755

Letter from Joseph D. Craven, Delaware Attorney General, to Hugh R. Sharp, Delaware State Highway Department (May 31, 1955) 4777

Findings of Robert W. Knecht, Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration: Approval of the Delaware Coastal Management Program (Aug. 21, 1979) 4785

Granting the Consent of Congress to Amendments to the Delaware-New Jersey Compact: Hearing on H.R.J. Res. 657 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) (statement of Hon. William J. Hughes, A Representative in Congress from the State of New Jersey) 4833

County tax record for Parcel #0699999027 (Owner: Keystone Energy Services Co. LP) New Castle County, DE (June 22, 2006) 4881

APPENDIX G
New Jersey's Proposed Judgment
No. 134, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

NEW JERSEY'S PROPOSED DECREE

The Court having exercised original jurisdiction to determine the rights of the States of New Jersey and Delaware under the Compact of 1905; and the issues raised having been tried before the Special Master appointed by the Court;

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Compact of 1905 between the State of New Jersey and the State of Delaware grants exclusive State riparian jurisdiction to New Jersey to regulate all aspects of the construction, maintenance and use of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle that extend outshore of the mean low water line. The Compact also grants New Jersey exclusive State jurisdiction over vessels using or attaching to such improvements.

2. The Compact of 1905 authorizes New Jersey to convey those grants, leases, licenses or other interests in the bed of the Delaware River within the Twelve Mile Circle outshore of the mean low water line that are reasonably related to the exercise of its jurisdiction under paragraph 1.

3. Delaware is enjoined from requiring any permit, license, lease, certification, determination or other authorization for the construction, maintenance or use [of] a riparian improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle.

4. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be considered necessary or desirable to give proper force and effect to this Decree or to effectuate the rights of the parties.

5. The party States shall share equally in the compensation of the Special Master and his assistants, and in the expenses of this litigation incurred by the Special Master.

APPENDIX H
Delaware's Proposed Judgment

No. 134, Original

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

DELAWARE'S PROPOSED FORM OF JUDGMENT

The Special Master having ruled on Delaware's and New Jersey's cross-motions for summary judgment, I hereby recommend that the Court issue the following decree:

It is now ORDERED, ADJUDGED, and DECREED as follows:

1. New Jersey's request for relief is denied and its complaint is dismissed with prejudice.

2. Under the 1905 Compact and this Court's decision in *New Jersey v. Delaware*, 291 U.S. 361 (1934), New Jersey lacks any jurisdiction within the twelve-mile circle to regulate proposed or existing improvements on Delaware

lands, regardless of whether they originate in New Jersey; or to grant, lease, or convey Delaware lands. Accordingly, BP's proposed Crown Landing facility is subject to regulation under the Delaware Coastal Zone Act.

3. New Jersey is enjoined within the twelve-mile circle from exercising any riparian jurisdiction beyond its border with Delaware and from granting, leasing, or conveying Delaware lands.

4. The parties shall share equally in the compensation of the Special Master and the costs incurred by him in the exercise of his duties.

5. The Court retains jurisdiction of this cause for the purpose of issuing any order or direction which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree.

APPENDIX I
Table of Actions by Delaware and New Jersey Reflecting an Assertion of Jurisdiction or Authority Over the Eastern Shore of the Delaware River

Actions Prior to Adoption of Compact of 1905

Date	Category of Action	Specific Action	State Asserting Jurisdiction or Authority
May 27, 1813	Legislation	Delaware adopted an Act (Del. Laws 1829, p. 673) ceding to the United States jurisdiction over Pea Patch Island on the Delaware River within the twelve-mile circle. By implication, Delaware was asserting jurisdiction over this island.	Delaware
1846	Legislation	New Jersey enacted a law setting the boundary line of Salem County at the main shipping channel of the Delaware River. 846 N.J. Laws, approved April 10, 1846, 2 Comp. Stat. 1690.	New Jersey

1852	Legislation	Delaware adopted the Boundary Act of 1852, stating that the limits of Delaware extend to the "low water mark on the eastern side of the Delaware River, within the twelve mile circle from New Castle."	Delaware
1854	Legislation, Wharfage	New Jersey adopted 1854 N.J. Laws ch. 143, p. 375, pertaining to the construction of docks, piers or wharves by Thomas D. Broadway, et al., in front of their lands at Pennsville in the Township of Lower Penns Neck, Salem County, New Jersey.	New Jersey
1855	Legislation, Wharfage	New Jersey adopted 1855 N.J. Laws ch. 109, p. 274, incorporating the Pennsgrove Pier Company and pertaining to construction of a wharf or pier extending from the mainland into the Delaware River at the Village of Pennsgrove.	New Jersey
1870	Legislation, Wharfage	New Jersey Legislature adopted 1870 N.J. Laws ch. 131, p. 346, pertaining to the construction of wharves, piers and bulkheads by Robert Walker, et al., in	New Jersey

		front of their lands in the Township of Upper Penns Neck (now Pennsville).	
1870	Legislation, Wharfage	New Jersey adopted 1870 N.J. Laws ch. 344, p. 726, pertaining to construction of a dock or wharf by Joseph Guest in front of his lands in the Township of Upper Penns Neck, (now Pennsville) Salem County, New Jersey.	New Jersey
1871	Legislation, Wharfage	New Jersey adopted 1871 N.J. Laws ch. 307, p. 758, pertaining to construction of wharves or piers by Henry Barber in front of his lands in the Township of Upper Penns Neck, (now Pennsville) Salem County, New Jersey.	New Jersey
1871	Legislation	New Jersey adopted 1871 N.J. Laws, c. 256, pertaining to grants and leases of tidally-flowed underwater lands outshore of the mean high water line by the New Jersey Board of Riparian Commissioners and Governor. See N.J. Stat. Ann. 12:3-10.	New Jersey
May 2, 1872	Arrests	Delaware officials arrested twenty-two fishermen from New Jersey for fishing within the	Delaware

		twelve-mile circle without a license from Delaware, pursuant to "An Act for the Protection of Fishermen," enacted by Delaware on March 28, 1871.	
May 8, 1872	Proclamation	New Jersey Governor Joel Parker issued a proclamation asserting New Jersey's claim to jurisdiction over that part of Delaware River between the States that is easterly of the middle of the river and "warn[ing] all persons not to molest, disturb, arrest, or attempt to arrest, without lawful process, issued by some legal authority in this State, any citizen of New Jersey, at any place within her jurisdiction."	New Jersey
May 14, 1872	Proclamation	Delaware Governor James Ponder responded to Governor Parker's proclamation by asserting, "The State of Delaware does not regard the question as to her jurisdiction over the said river and bay, as claimed by her, as an open question. The jurisdiction thus claimed is exclusive over the waters of said river to low water mark, on the eastern	Delaware

		side of said river, within the twelve mile circle from New Castle, and is regarded by said State as paramount to any which may be claimed by any other State."	
March 13, 1877	Pleadings	New Jersey filed a bill of complaint and motion for preliminary injunction against Delaware in a case before the Supreme Court of the United States, No. 1, Original (*New Jersey v. Delaware I*). New Jersey claimed to own in fee simple the bed of the Delaware River from the New Jersey shore to the middle of the river, and claimed that on every part of the waters of the Delaware River it had and was entitled to an equal interest and concurrent jurisdiction with Delaware.	New Jersey
November 3, 1877	Regulation, Wharfage	The Board of Riparian Commissioners of the State of New Jersey (Riparian Commissioners) adopted pierhead and bulkhead lines for a portion of the Delaware River within the twelve-mile circle offshore of the County of Gloucester and the County of Salem.	New Jersey

February 17, 1883	Grants/Leases	New Jersey issued a tidelands grant to Daniel H. Kent of Wilmington, Delaware, which by its terms includes submerged lands. By its terms, Tract 1 of the February 17, 1883 grant extends 300 feet on one side and 400 feet on the other to the exterior line established by the Riparian Commissioners in the Delaware River and Salem Cove in 1877, and is described as "flowed by tide water lying in the Township of Elsinboro."	New Jersey
September 15, 1891	Grants/Leases	New Jersey issued a tidelands grant to Annie E. Brown. By its terms, the 1891 grant to Annie E. Brown extended 850 feet on one side into the Delaware River and 850 feet on the other to the Exterior Line of the New Jersey Board of Riparian Commissioners and is described as pertaining to property "flowed by tide water lying in Pennsville in the Township of Lower Penn's Neck. . . ."	New Jersey

November 27, 1891	Grants/Leases	New Jersey issued a tidelands grant to Eugene DuPont, et al., all of New Castle County, Delaware, trading as E.I. DuPont de Nemours and Company ("Dupont") (the November 27, 1891 grant). The property covered by the November 27, 1891 grant is within the twelve-mile circle, and extends from high water into the Delaware River 550 feet to the New Jersey Board of Riparian Commissioners' Exterior Line.	New Jersey
October 15, 1901	Pleadings	Delaware filed its Answer in *New Jersey v. Delaware I* denying New Jersey's claims and averring, *inter alia*, that Delaware is the owner of the whole bed of the Delaware River and of the river itself within the twelve mile circle to the low-water mark on the New Jersey shore.	Delaware

Actions After Adoption of Compact of 1905 and Prior to *New Jersey v. Delaware II*

May 16, 1906	Grants/Leases	New Jersey issued a tidelands grant to James A. Denny, et al., covering property offshore of what is now known as Block 1, Lot 4, Penns Grove Borough, within the twelve-mile circle, and by the terms of the grant extending 500 feet waterward of high water into the Delaware River.	New Jersey
March 29, 1907	Legislation	New Jersey adopted an act to cede to the United States submerged land within the twelve-mile circle east of the ship channel. By implication, New Jersey was asserting jurisdiction over that land.	New Jersey
April 4, 1907	Legislation	Delaware adopted an Act to cede to the United States the same submerged land within the twelve-mile circle east of the ship channel as is referenced in the preceding paragraph. By implication, Delaware was asserting jurisdiction over that land.	Delaware

1914	Legislation	New Jersey adopted the Waterfront Development Law, 1914 N.J. Laws c. 123, pertaining to construction of waterfront developments such as a bulkhead, pier, wharf, dock. bridge, pipe line or cable. See N.J. Stat. Ann. 12:5-1 et seq. Thereafter, grants of submerged land within the twelve-mile circle specified that improvements required a permit.	New Jersey
1915	Legislation	Delaware adopted the Boundary Act of 1915, declaring the limits of the State to extend to the low water mark on the Eastern side of the Delaware River within the twelve-mile circle.	Delaware
1916	Regulation	New Jersey Board of Commerce and Navigation adopted new pierhead and bulkhead lines for the eastern shore of the Delaware River within the twelve-mile circle and outshore of the mean low water line.	New Jersey

March 21, 1916	Grants/Leases	New Jersey issued a tidelands grant to Pennsgrove Pier Co. (the March 21, 1916 grant), by its terms covering property offshore of Penns Grove Borough, Salem County, New Jersey that extends 885 feet on one side and 975 feet on the other to the New Jersey Pierhead and Bulkhead line.	New Jersey
March 27, 1916	Grants/Leases	New Jersey issued a tidelands lease to Harry S. Barber (the March 27, 1916 lease), by its terms covering property outshore of Block 54, Lots 1 and 2, Penns Grove Borough, extending 575 feet from the high water line into the Delaware River.	New Jersey
August 21, 1916	Regulation, Wharfage	New Jersey Board of Commerce and Navigation adopted pierhead and bulkhead lines on part of the eastern portion of the Delaware River, outshore of mean low water within the twelve-mile circle (the New Jersey Pierhead and Bulkhead Lines (1916)).	New Jersey

August 21, 1916	Grants/Leases	New Jersey issued a tidelands grant to DuPont (the August 21, 1916 grant), by its terms including nine tracts within the twelve-mile circle in either Pennsville Township, Carneys Point Township or Penns Grove Township. The tracts included in the August 21, 1916 grant extend from the high water mark into the Delaware River various distances, from 202 feet on one side of Tract One to 4,222.1 feet on one side of Tract Seven.	New Jersey
November 20, 1916	Grants/Leases	New Jersey issued a tidelands grant to DuPont, by its terms covering property offshore of what is now known as Block 301, Lot 1, Pennsville Township, at Deep Water Point, and within the twelve-mile circle (the November 20, 1916 grant). By its terms, the November 20, 1916 grant extends 661.3 feet from high water on one side and 650 feet on the other, into the Delaware River, both to the New Jersey Pierhead and Bulkhead line (1916).	New Jersey

March 27, 1917	Legislation	New Jersey passed a law granting jurisdiction over and title to lands in the Delaware River to the United States for bulkhead and fill. 1917 N.J. Laws ch. 189.	New Jersey
July 16, 1917	Grants/Leases	New Jersey issued a tidelands grant to DuPont, by its terms consisting of two tracts that are offshore of what is now known as Block 1 or 301, Lot 1, Pennsville Township, and within the twelve-mile circle (the July 16, 1917 grant). By its terms the July 16, 1917 grant extends 668 feet on one side of tract 1, and 648 feet on both sides of tract 2, offshore of the high water line and into the Delaware River, all to the New Jersey Pierhead and Bulkhead line (1916) and by its terms is described as property "flowed by tide water situate at Deep Water Point, in the County of Salem. . . ."	New Jersey
1918-1939	Grants/Leases	New Jersey State granted a tidelands lease to DuPont dated May 20, 1918 (the May 20, 1918 lease).	New Jersey

October 17, 1921	Grants/Leases	New Jersey issued a tidelands grant to French's Hotel Company, by its terms covering property offshore of what is now known as Block 57, Lot 1, Penns Grove Borough, and within the twelve-mile circle (the October 17, 1921 grant). By the terms of the grant, the property covered by the October 17, 1921 grant extends offshore from the high water mark 1,135.38 feet on one side and 1,283.86 feet on the other, and into the Delaware River.	New Jersey
February 19, 1923	Grants/Leases	New Jersey issued a tidelands grant to William D. Acton, by its terms covering property now offshore of Pennsville Township, within the twelve-mile circle (the February 19, 1923 grant). The property covered by the February 19, 1923 grant extends 333.52 feet from the high water line to the corner of a pre-existing pier, and another 580 feet further waterward to the 1916 pierhead and bulkhead line on one side, and 360.75 feet from the original high water line to a corner of the pre-existing pier, and another 572.66 feet further waterward to the New Jersey Pierhead and Bulkhead line	New Jersey

		(1916), on the other side. The February 19, 1923 grant refers to a pier.	
November 19, 1923	Grants/Leases	New Jersey issued a tidelands grant to William D. Acton, by its terms covering property extending 970 feet on one side from the high water mark into the Delaware River, and 964 feet from the high water line on the other side to the 1916 pierhead and bulkhead line, outshore of the Township of Lower Penns Neck, Salem County, New Jersey.	New Jersey
August 18, 1924	Grants/Leases	New Jersey issued a tidelands lease to Fogg and Hires Company for 15 years (the Fogg and Hires lease), by its terms covering property offshore of what is now known as Block 2801, Lot 6, Pennsville Township, at the foot of Ferry Road, and within the twelve-mile circle. By its terms the property covered by the Fogg and Hires Co. lease extended 985.44 feet offshore from the high water line of the Delaware River on one side and an approximately equal	New Jersey

		distance offshore on the other side to the New Jersey Pierhead and Bulkhead line (1916). The Fogg and Hires Co. lease was cancelled May 18, 1930 and replaced with a State of New Jersey grant to the Delaware – New Jersey Ferry Company dated May 19, 1930, which grant encompassed a property with the same dimensions and location as the Fogg and Hires lease.	
April 14, 1925	Legislation	Delaware adopted an Act (34 Del. L. p. 6) to cede to the United States 605 acres of lands within the twelve-mile circle, to the low water mark on the easterly side of the Delaware River, for the purpose of constructing a basin for the reception of material dredged from the channel of the Delaware River. By implication, Delaware was asserting jurisdiction over those lands.	Delaware
August 17, 1925	Grants/Leases	New Jersey issued a tidelands grant to William D. Acton , by its terms covering property that extends 863.21 feet from the	New Jersey

		high water line into the Delaware River on one side, and 853.87 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916), offshore of Lower Penns Neck (now Pennsville Township), Salem County, New Jersey.	
August 17, 1925	Grants/Leases	New Jersey issued a second tidelands grant to William D. Acton, by its terms covering property located offshore of Lower Penns Neck (now Pennsville Township), Salem County, New Jersey, that extends 965.40 feet on one side and 966.63 feet on the other beyond the former high water line of the Delaware River to the New Jersey Pierhead and Bulkhead line (1916). The records of the Army Corps of Engineers indicate that a permit was issued to W.D. Acton to construct a Timber Pier to be located offshore of the North side of Pittsfield Street, Pennsville, and that the pier completed May 22, 1926 was 550 feet long.	New Jersey

September 21, 1925	Grants/Leases	New Jersey issued a tidelands grant to the Township of Lower Penns Neck (the September 21, 1925 grant), covering property that is now offshore of Pennsville Township, within the twelve-mile circle. By its terms, the property covered by the September 21, 1925 grant extends 966.83 feet on one side and 969.91 feet on the other, outshore of the former high water line of the Delaware River.	New Jersey
October 19, 1925	Grants/Leases	New Jersey issued a tidelands grant to William D. Acton, by its terms covering property that is now outshore of Pennsville Township, within the twelve-mile circle (the October 19, 1925 grant). By the terms of the grant, the property covered by the October 19, 1925 grant extends waterward from the former high water line 360.75 feet to a point on an adjoining pier, and then another 572.66 feet into the Delaware River on one side to the New Jersey Pierhead and Bulkhead Lines	New Jersey

		(1916), and 375.41 feet to a point waterward and then another 565.67 feet further waterward into the Delaware River to the New Jersey Pierhead and Bulkhead line (1916) on the other side.	
1925	Fishing	Oyster boats from Delaware dredged and took many thousands of bushels of seed oysters from subaqueous lands claimed by New Jersey.	Delaware
February 21, 1927	Legislation	Delaware adopted an Act (35 Del. L. pp. 6-8) to cede to the United States 1,541 acres of submerged lands within the twelve-mile circle, to the low water mark on the easterly side of the Delaware River, for the purpose of constructing a basin for the reception of material dredged from the channel of the Delaware River. By implication, Delaware was asserting jurisdiction over those lands.	Delaware
June 19, 1928	Grants/Leases	New Jersey issued a tidelands grant to The Franklin Real Estate Company by its	New Jersey

		terms covering property that is now offshore of Block 301, Lot 13, Pennsville Township, within the twelve-mile circle, and that extends 991.46 feet from high water into the Delaware River on one side and 827.70 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916).	
April 15, 1929	Grants/Leases	New Jersey issued a tidelands grant to William G. Locuson (the William Locuson grant) covering property offshore of what is now known as Block 301, Lot 9, Pennsville Township, within the twelve-mile circle. By the terms of the grant, the property covered by the William Locuson grant extends 827.70 feet waterward of the high water line on one side and 823.60 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916).	New Jersey
April 15, 1929	Grants/Leases	New Jersey issued a tidelands grant to Anna C.B. Locuson (the Anna Locuson grant), by its terms covering property	New Jersey

		located offshore of Pennsville Township, and within the twelve-mile circle, that extends 813.97 feet into the Delaware River from the high water line on one side and 809.16 feet from the high water line on the other, both to the New Jersey Pierhead and Bulkhead Lines (1916).	
April 15, 1929	Grants/Leases	New Jersey issued a tidelands grant to Josephine Grace Locuson, et al., (the Josephine Locuson grant), covering property offshore of Pennsville Township and within the twelve-mile circle, that by its terms extends from the high water line of the Delaware River waterward 813.97 feet on one side and approximately 818.78 feet on the other, both to the New Jersey Pierhead and Bulkhead Line (1916).	New Jersey
April 15, 1929	Grants/Leases	New Jersey issued a tidelands grant to Josephine Grace Locuson, et al., (the second Josephine Locuson grant), covering property offshore of Pennsville Township, and within the twelve-mile circle, that by	New Jersey

		its terms extends from the high water mark 823.60 feet on one side and 818.78 feet on the other, into the Delaware River, both to the New Jersey Pierhead and Bulkhead line (1916).	
June 3, 1929	Pleadings	New Jersey filed a complaint against the State of Delaware in the Supreme Court asserting title to half the river, originally docketed as No. 19, Original (October Term, 1929) (*New Jersey v. Delaware II*).	New Jersey
June 17, 1929	Grants/Leases	New Jersey issued a tidelands grant to Josephine Grace Locuson et al. (the June 17, 1929 grant), covering property offshore of Pennsville Township, within the twelve-mile circle. By the terms of the grant, the property covered by the June 17, 1929 grant extends from the high water line 809.16 feet into the Delaware River on one side and 797.42 feet on the other, both to the New Jersey Pierhead and Bulkhead line (1916).	New Jersey

October 9, 1929	Pleadings	Delaware filed its Answer in *New Jersey v. Delaware II*, denying New Jersey's assertions.	Delaware
October 21, 1929	Grants/Leases	New Jersey issued a tidelands grant to DuPont (the October 21, 1929 grant), covering property offshore of what is now known as Block 1 or 301, Lot 1, Pennsville Township, within the twelve-mile circle. By the terms of the grant, the property covered by the October 21, 1929 grant extends from the mean high water mark 648 feet into the Delaware River to the New Jersey Pierhead and Bulkhead line (1916).	New Jersey
October 21, 1929	Grants/Leases	New Jersey issued a tidelands license to the Delaware River Power Company (the October 21, 1929 license), covering property offshore of Pennsville Township within the twelve-mile circle. By its terms the October 21, 1929 license allows for eight armored submarine electric cables at Deep Water Point.	New Jersey

October 21, 1929	Grants/Leases	New Jersey issued a tidelands lease to the Penn Beach Property Owners' Association (the October 21, 1929 lease). By its terms the property covered by the October 21, 1929 lease was a "tract of land flowed by tide-water situate in the Township of Lower Penns Neck," Salem County, and extended 429.49 feet beyond the mean high water line on one side and 430.70 feet on the other to the New Jersey Pierhead and Bulkhead Lines (1916).	New Jersey

Actions After Issuance of the Opinion and Decree in *New Jersey v. Delaware II*

September 16, 1935	Grants/Leases	New Jersey issued a tidelands grant to J. Landis Strickler covering property outshore of Block 54, Lot 1, Penns Grove Borough that extends 249.36 feet waterward of the center line of Delaware Avenue.	New Jersey
September 13, 1943	Grants/Leases	New Jersey issued a tidelands grant to DuPont (the September 13, 1943 grant).	New Jersey

October 14, 1957	Grants/Leases	New Jersey issued a tidelands grant to Sun Oil Company (the October 14, 1957 grant) covering property outshore of what is now known as Block 101, Lots 2 and 5, Logan Township, Gloucester County, and within the twelve-mile circle. The property covered by the October 14, 1957 grant extends 1,245 feet from the mean high water line on one side and 1,245.82 feet on the other into the Delaware River.	New Jersey
March 31, 1960	Grants/Leases	New Jersey issued a tidelands grant to DuPont (the March 31, 1960 grant), covering property outshore of Pennsville Township, within the twelve-mile circle. The property covered by the March 31, 1960 grant extends 1,027.61 feet waterward of the high water line of the Delaware River on one side and 1,096 feet on the other, both sides out to the New Jersey Pierhead and Bulkhead line (1916). The March 31, 1960 grant includes as a second tract a further area	New Jersey

		100 feet waterward of the New Jersey Pierhead and Bulkhead line (1916).	
January 11, 1962	Grants/Leases	Delaware entered into a twenty-year subaqueous land lease allowing the SunOlin Chemical Company to use Delaware subaqueous soil within the twelve-mile circle to construct, maintain, repair, replace, renew and operate submarine pipelines across the Delaware River from Claymont, Delaware to Gloucester County, New Jersey. Delaware renewed this lease on November 14, 1981 for a period of ten years. This lease was again renewed on October 15, 1991 for a period of ten years, and on May 15, 2002 for a period of twenty years.	Delaware
October 9, 1963	Grants/Leases	Delaware entered into a ten-year subaqueous land lease allowing the Colonial Pipeline Company to use Delaware subaqueous soil within the twelve-mile circle near Logan Township, New Jersey to construct, maintain, inspect, operate,	Delaware

		renew, replace, repair, improve and remove submarine pipelines, from Claymont, Delaware to Logan Township, Gloucester County, New Jersey.	
September 29, 1967	Grants/Leases	New Jersey issued a tidelands grant to DuPont (the September 29, 1967 grant). By the terms of the grant, the property covered by the September 29, 1967 grant is outshore of Pennsville Township and abuts to the north the March 31, 1960 grant to DuPont. The property covered by the September 29, 1967 grant extends 1,096 feet waterward of the high water line of the Delaware River on one side and 1,155 feet on the other.	New Jersey
September 29, 1971	Grants/Leases	Delaware granted a ten-year lease to allow DuPont to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers Works facility within the twelve-mile circle near the New Jersey shore. By its terms, the lease is "without	Delaware

		prejudice to the title claim of either party."	
December 1971	Regulation, Wharfage	El Paso Eastern Company submitted a proposal to construct a liquefied natural gas ("LNG") facility in New Jersey, which included a proposal to build a pier from the New Jersey shore into Delaware within the twelve-mile circle. On February 23, 1972, Delaware issued a status decision stating that El Paso's proposal was a prohibited use under the DCZA.	Delaware
September 16, 1977	Regulation	New Jersey Department of Environmental Protection ("NJDEP") issued a permit to Dupont for maintenance dredging at Dupont's Chambers Works facility beyond the low water line of the Delaware River, within the twelve-mile circle.	New Jersey
1977	Regulation	NJDEP issued to Dupont a permit to dismantle and remove wastewater outfall structures in the Delaware River within the twelve-mile circle.	New Jersey

March 18, 1982	Regulation	Delaware issued a Letter of Authorization to DuPont in Deepwater, New Jersey by its terms allowing DuPont to repair and replace an existing 36 pile cluster in subaqueous soil within the twelve-mile circle outshore of low water.	Delaware
1982	Regulation	NJDEP issued a waterfront development permit and water quality certificate for the DuPont facility in Carneys Point and Pennsville, New Jersey, by the terms of the permit allowing dredging of the berth area of an existing pier.	New Jersey
1982	Regulation	NJDEP issued to DuPont a waterfront development permit for a new sheet piling cell, by its terms allowing replacement of an existing timber cluster on the Delaware River, at Dupont's Chambers Works Plant in Deepwater, New Jersey.	Delaware
1987	Regulation	NJDEP issued New Jersey Pollution Discharge Elimination System permit NJ0005100DSW to Dupont, allowing it to	New Jersey

		discharge effluent from its Chambers Works facility in Pennsville Township, New Jersey, into the Delaware River.	
July 28, 1987	Regulation	Delaware entered into a ten-year subaqueous lands lease allowing the Columbia Gas Transmission Corp. to construct a submerged natural gas pipeline across the Delaware River within the twelve-mile circle. The lease also allowed Columbia Gas to dredge 552 cubic yards of material from subaqueous lands within the twelve-mile circle. This lease was renewed on January 8, 1998.	Delaware
August 3, 1987	Regulation	Delaware entered into a ten-year subaqueous lands lease allowing the Colonial Pipeline Company to construct a 30 inch submerged petroleum pipeline across the Delaware River within the twelve-mile circle, and dredge subaqueous lands within the twelve-mile circle.	Delaware

July 13, 1990	Regulation	Keystone Cogeneration Systems Inc., currently known as the Logan Generating Company, applied to Delaware's Department of Natural Resources and Environmental Control ("DNREC") for a status decision relating to its proposal to build a 200 megawatt coal-fueled cogeneration facility in Logan Township, New Jersey, including a 1,100 pier extending from the New Jersey shore into Delaware territory within the twelve-mile circle. In a status decision dated November 19, 1990, DNREC determined that the Keystone project did not constitute a prohibited bulk product transfer facility under the DZCA and that a permit under the DCZA was required. DNREC issued a coastal zone permit to Keystone on December 13, 1991.	Delaware
September 30, 1991	Regulation	DNREC issued a subaqueous lands lease by its terms permitting the construction of the coal unloading pier and permitting the	Delaware

		dredging of 40,000 cubic yards of material from the Delaware River within the twelve-mile circle. On May 28, 1993, Delaware issued additional approvals for the Keystone facility to allow for a modification of pier dimensions. On March 15, 1995, Delaware issued a letter of authorization for a one year extension of the subaqueous lands permit issued on September 30, 1991, and provided permission to dredge an additional 13,750 cubic yards of material within the twelve-mile circle. On November 12, 1997, Delaware issued a letter of authorization for maintenance dredging at the facility. On November 9, 2001, Delaware issued a renewal to maintain a pier, docks and dolphins at the facility.	
September 24, 1991	Regulation	NJDEP issued to Keystone Cogeneration Systems Inc. in Logan Township, New Jersey, stream encroachment, waterfront development and freshwater wetlands	New Jersey

		permits and a Water Quality Certificate, for a coal unloading facility and a 1600-foot approach-way pier.	
June 12, 1992	Regulation	New Jersey issued a lease to Keystone Urban Renewal Limited Partnership (the June 12, 1992 lease), by its terms covering property outshore of what is now known as Block 101, Lots 2 and 5, Logan Township, Gloucester County and outshore of part of the property covered by the October 14, 1957 Grant to the Sun Oil Company. By its terms, the property covered by the June 12, 1992 lease extends approximately 1,600 feet offshore of the original mean high water line into the Delaware River, within the twelve-mile circle.	New Jersey
September 1995	Grants/Leases	NJDEP Division of Parks and Forestry applied to DNREC for a subaqueous land lease to permit New Jersey to rehabilitate a pier and construct a new floating ferry dock on Delaware subaqueous soil within the twelve-mile	Delaware

		circle near Fort Mott State Park in Pennsville Township, New Jersey. On February 7, 1996, Delaware entered into a ten-year subaqueous land lease with the NJDEP Division of Parks and Forestry.	
January 24, 1996	Regulation	NJDEP issued a waterfront development permit to NJDEP's Division of Parks and Forestry for the rehabilitation of the historic pier at Fort Mott State Park in Pennsville Township, and other work specified in the permit.	New Jersey
1996	Regulation	NJDEP issued and renewed in 2005 a water allocation permit for the Keystone Cogeneration Systems, Inc. facility located in Logan Township. The water allocation permit allows the facility to withdraw up to 108.5 million gallons of water per month from the Delaware River through an intake structure located beyond the low water line, within the twelve-mile circle, that extends approximately 1,600 feet into the Delaware River.	New Jersey

December 9, 1997	Grants/Leases	Delaware entered into a ten-year subaqueous land lease allowing Delmarva Power and Light Company to install 3,755 linear feet of submarine fiber optic cable in the Delaware River within the twelve-mile circle extending from Pigeon Point in New Castle County, Delaware, to Deepwater Point in New Jersey. This lease was amended on March 11, 2002.	Delaware
March 22, 2000	Regulation	NJDEP issued to Pennsville Township a waterfront development permit for removal of a municipal boat ramp and construction of a new ramp.	New Jersey
January 11, 1999	Grants/Leases	New Jersey issued a lease to William G. Bergmann, et al., renewed February 13, 2002 (the January 11, 1999 lease). By the terms of the lease, the property covered by the January 11, 1999 lease extends 35 feet waterward of the high water line, and is located offshore of what is now known as Block 1601, Lot 25, on North River Drive in the Township of Pennsville.	New Jersey

April 25, 2000	Grants/Leases	New Jersey issued a lease to the Township of Pennsville (the April 25, 2000 lease), by its terms covering property outshore of Block 3428, part of Lot 1, Township of Pennsville, at the foot of Dartmouth Road, that extends 95 feet offshore of the existing bulkhead and mean high water line (1999).	New Jersey
January 24, 2001	Grants/Leases	New Jersey granted an Assignment of Management Rights (lease) to the New Jersey Division of Parks and Forestry (the January 24, 2001 lease), covering property offshore of Block 5301, Lot 3, Pennsville Township, and within the twelve-mile circle. By the lease terms, the property subject to the January 24, 2001 lease includes a pier offshore of Block 5301, Lot 3, Pennsville Township that extends 350 feet waterward of the high water line into the Delaware River.	New Jersey

February 20, 2001	Regulation	NJDEP issued to Pennsville Township a waterfront development permit for installation of stormwater force main pipes, which were 113 feet long.	New Jersey
May 4, 2001	Grants/Leases	Delaware issued a subaqueous lands permit to DuPont Chambers Works located near Deepwater, New Jersey, by its terms allowing DuPont to dredge approximately 4,650 cubic yards of material from the Delaware River within the twelve-mile circle, to backfill existing elevations on a 0.71 acre site in the Delaware River, and to install a temporary sheet pile wall surrounding the proposed excavation in the Delaware River.	Delaware
May 10, 2005	Grants/Leases	Delaware Wetlands and Subaqueous Lands Section issued a twenty-year subaqueous lands lease and a water quality certification to Fenwick Commons, LLC ("Fenwick") in connection with a project to rehabilitate a dilapidated pier at the end	Delaware

		of west main street in Penns Grove, New Jersey. By its terms, the lease permits Fenwick to construct a 40 foot wide by 750 foot long pier, a 6 foot wide by 95 foot long aluminum gangway, a 28 foot wide by 120 foot long floating dock and breakwater, 6 support pilings, 1,255 linear feet of steel bulkhead and permission to fill 1,882 square feet of public subaqueous lands near Penns Grove, New Jersey. On May 6, 2005, counsel for Fenwick wrote to DNREC stating that "the issue as to the ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey."	
August 10, 2006	Grants/Lease	New Jersey State Park Service applied to Delaware to renew its subaqueous lands lease for the Fort Mott pier. On December 19, 2006, a New Jersey official wrote to DNREC that the Park Service's lease application was "without prejudice" to New Jersey's position in this lawsuit.	Delaware

September 27, 2004	Regulation	British Petroleum ("BP"), through its wholly owned indirect subsidiary, Crown Landing, LLC, requested permission from DNREC's Wetlands and Subaqueous Lands Section to drill geotechnical test borings in the Delaware River in connection with a proposal to construct a liquefied natural gas ("LNG") terminal on the Delaware River. The proposed facility is commonly referred to as the "Crown Landing project" or "Crown Landing facility."	Delaware
December 7, 2004	Regulation	BP, through its wholly-owned indirect subsidiary, Crown Landing, LLC, applied to DNREC for a status determination under the Delaware Coastal Zone Act for the proposed Crown Landing project.	Delaware
January 7, 2005	Regulation	BP filed a Waterfront Development Application with the NJDEP's Office of Dredging and Sediment Technology.	New Jersey
February 3, 2005	Regulation	DNREC issued a status decision determining that BP's proposed project was a	Delaware

		prohibited "offshore bulk transfer facility" as well as a prohibited "heavy industry use" under the Delaware Coastal Zone Act.	
February 15, 2005	Regulation	BP filed an administrative appeal to the Delaware Coastal Zone Industrial Board ("CZICB").	Delaware
April 14, 2005	Regulation	CZICB affirmed DNREC's status decision determining that BP's Crown Landing project was a bulk product transfer facility prohibited under the DCZA. BP did not appeal that decision.	Delaware
July 28, 2005	Pleadings	New Jersey filed in the Supreme Court a Motion to Reopen and for Supplemental Decree in No. 11, Original, accompanied by a petition and brief in support thereof.	New Jersey

APPENDIX J
Table Comparing Similar Provisions in the New Jersey-New York Compact of 1834 and the New Jersey-Delaware Compact of 1905

New Jersey-New York Compact of 1834	New Jersey-Delaware Compact of 1905
Whereas commissioners duly appointed on the part of the state of New York, *and commissioners duly appointed on the part of the state of* New Jersey, *for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two states, have executed certain articles, which are contained in the words following,* viz:	*Whereas commissioners duly appointed on the part of the State of New* Jersey *and commissioners duly appointed on the part of the State of* Delaware, *for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States, have executed certain articles, which are contained in the words following,* namely:
Article Sixth. *Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offence committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid*; or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the third	Article I. *Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State,* or upon the eastern half of said Delaware River, *or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any*

article; *and also civil process issued under the authority of the state of New Jersey against any person domiciled in that state, or against property taken out of that state to evade the laws thereof; may be served upon any of the said waters* within the exclusive jurisdiction of the state of New York, *unless such person or property shall be on board a vessel aground upon, or fastened to, the shore of the state of* New York, *or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of* New York.	*person domiciled in that State, or against property taken out of that State to evade the laws thereof, may he served upon any portion* of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch islands, *unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of* Delaware, or the shores of said islands, *or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of* Delaware.
Article Seventh. *Criminal process, issued under the authority of the state of* New York, *against any person accused of an offence committed within that state, or committed on board of any vessel being under the exclusive jurisdiction of that state as aforesaid*, or committed against the regulations made or to be made by that state in relation to the fisheries mentioned in the fifth	Article II. *Criminal process issued under the authority of the State of* Delaware *against any person accused of an offense committed upon the soil of said State*, or upon the western half of said Delaware River, *or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of* Delaware *against*

article; *and also civil process issued under the authority of the state of* New York *against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof; may be served upon any of the said waters* within the exclusive jurisdiction of the state of New Jersey, *unless such person or property shall be on board a vessel aground upon or fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.*	*any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion* of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, *unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.*

APPENDIX K
Docket of Proceedings Before the Special Master

Date	Filings
2005-07-28	Motion to Reopen and for a Supplemental Decree, Petition, Brief and Appendix in Support of Motion
2005-10-27	Brief of the State of Delaware in Opposition to the State of New Jersey's Motion to Reopen and for a Supplemental Decree
2005-10-27	Lodging for Brief of the State of Delaware in Opposition to the State of New Jersey's Motion to Reopen and for Supplemental Decree of the State of Delaware
2005-11-08	Reply Brief and Supplemental Appendix in Support of Motion to Reopen and for a Supplemental Decree
2005-12-28	Answer of State of Delaware and Motion for Appointment of Special Master
2006-01-04	Brief in Opposition to Delaware's Motion for Appointment of Special Master
2006-01-17	Reply in Support of Motion for Appointment of Special Master
2006-01-23	Order Appointing Ralph Lancaster as Special Master
2006-01-26	Oath of Ralph Lancaster
2006-02-06	Telephone Conference Transcript
2006-02-08	Case Management Order No. 1
2006-02-08	Case Management Plan
2006-02-10	New Jersey's List of Issues
2006-02-17	Delaware's Statement of Issues

2006-02-24	Case Management Order No. 2
2006-03-06	Delaware's Progress Report
2006-03-06	New Jersey's Progress Report
2006-03-06	Delaware's Notice of Service of Subpoena to BP America Production Company
2006-03-06	Delaware's Notice of Service of Subpoena to BP America, Inc
2006-03-06	Delaware's Notice of Service of Subpoena to BP Company North America, Inc
2006-03-06	Delaware's Notice of Service of Subpoena to BP Corporation North America, Inc
2006-03-06	Delaware's Notice of Service of Subpoena to BP Energy Company
2006-03-06	Delaware's Notice of Service of Subpoena to Crown Landing LLC
2006-03-08	Telephone Conference Transcript
2006-03-09	Delaware's Subpoena with return of service on BP America Production Company
2006-03-09	Delaware's Subpoena with return of service on BP America, Inc.
2006-03-09	Delaware's Subpoena with return of service on BP Company North America, Inc.
2006-03-09	Delaware's Subpoena with return of service on BP Corporation North America, Inc.
2006-03-09	Delaware's Subpoena with return of service on BP Energy Company
2006-03-09	Delaware's Subpoena with return of service on Crown Landing LLC
2006-03-20	New Jersey's Motion to Strike Delaware's Issues of Fact

2006-04-03	New Jersey's Certificate of Service re Initial Disclosures
2006-04-04	Delaware's Consent Motion to Amend Case Management Order No. 2
2006-04-05	Case Management Order No. 3
2006-04-07	Delaware's Progress Report
2006-04-07	New Jersey's Progress Report
2006-04-07	Case Management Order No. 4
2006-04-11	Telephone Conference Transcript
2006-04-28	Delaware's Notice of Service of Subpoena for Diamond Entertainment Group LLC
2006-04-28	Delaware's Notice of Service of Subpoena for Fenwick Commons LLC (DE Location)
2006-04-28	Delaware's Notice of Service of Subpoena for Fenwick Commons LLC (PA Location)
2006-05-04	Delaware's Notice of Service of Subpoena for Fenwick Commons LLC (NJ Location)
2006-05-04	Delaware's Proof of Service of Subpoena for Diamond Entertainment LLC
2006-05-04	Delaware's Proof of Service of Subpoena for Fenwick Commons LLC (DE location)
2006-05-04	Delaware's Progress Report
2006-05-04	New Jersey's Progress Report
2006-05-05	Case Management Order No. 5
2006-05-05	Delaware's Opposition to Motion to Strike of New Jersey (CONFIDENTIAL)
2006-05-05	Delaware's Opposition to Motion to Strike of New Jersey (PUBLIC)
2006-05-05	Telephone Conference Transcript

2006-05-10	Case Management Order No. 6
2006-05-17	BP's Motion to Quash, in part, Delaware's Subpoenas, or, for a Protective Order (CONFIDENTIAL)
2006-05-17	Motion to Quash, in part, Delaware's Subpoenas, or, for a Protective Order (PUBLIC)
2006-05-17	Delaware's Motion to Strike BP's Designation of Privilege Log as Confidential (PUBLIC)
2006-05-17	Delaware's Motion to Strike BP's Designation of Privilege Log as Confidential (CONFIDENTIAL)
2006-05-17	Delaware's Proof of Service of Subpoena for Fenwick Commons LLC (NJ location)
2006-05-17	New Jersey's Letter and Declarations re Delaware's Subpoenas and BP's Motion to Quash, in part, Subpoenas, or, in the alternative, for a Protective Order
2006-05-22	New Jersey's Reply Brief and Appendix in Support of Motion to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8 and 9 and to Preclude Discovery on These Issues
2006-05-31	Delaware's Notice of Service of Subpoena to E.I. Dupont de Nemours and Company
2006-05-31	Delaware's Notice of Service of First Set of Requests for Production of Documents to New Jersey
2006-05-31	New Jersey's Certificate of Service for First Request for Production of Documents
2006-05-31	New Jersey's Certificate of Service for First Set of Interrogatories

2006-06-02	New Jersey's Progress Report
2006-06-02	Delaware's Progress Report
2006-06-05	BP's Motion to Quash, in part, DE's Subpoenas, or, for a protective order (REV. PUBLIC)
2006-06-05	BP's Response to Motion of the State of Delaware to Strike BP's Designation of its Privilege Log and Supporting Declarations as Confidential
2006-06-05	DE's Opposition to BP's Motion to Quash, in part, Subpoenas Served by DE
2006-06-05	Delaware's Certificate of Service of Subpoena of E.I. Dupont de Nemours and Company
2006-06-05	New Jersey's Letter Brief in Response to Delaware's Motion to Strike BP's Designation of its Privilege Log as Confidential
2006-06-07	Telephone Conference Transcript
2006-06-12	New Jersey's Letter Reply to DE's Brief in Opposition to BP's Motion for a Protective Order
2006-06-12	BP's Reply Brief in Support of its Motion to Quash, in part, Subpoenas Served by the State of Delaware, or, in the alternative, for a Protective Order
2006-06-13	Order on New Jersey's Motion to Strike Delaware's Proposed Issues of Fact Nos. 1, 2, 6, 8 and 9 and to Preclude Discovery on Those Issues
2006-06-13	Case Management Order No. 7

2006-06-13	Delaware's Brief in Support of Motion to Strike BP's Designation of its Privilege Log and Supporting Declarations as Confidential (REV. PUBLIC)
2006-06-13	Delaware's Opposition to Motion of State of New Jersey to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8, and 9 and to Preclude Discovery on These Issues (REV. PUBLIC)
2006-06-20	Delaware's Letter Request for Modifications to Case Management Order No. 7
2006-06-20	New Jersey's Letter Request for Modifications to Case Management Order No. 7
2006-06-26	Delaware's Letter Response to New Jersey's Letter Request for Modifications to Case Management Order No. 7
2006-06-26	New Jersey's Letter Response to Delaware's Letter Request for Modifications to Case Management Order No. 7
2006-06-28	Case Management Order No. 8
2006-06-30	Delaware's Notice of Service of Responses to New Jersey's First Request for Production of Documents and First Set of Interrogatories
2006-07-07	Delaware's Progress Report
2006-07-11	Telephone Conference Transcript
2006-07-11	New Jersey's Proposed Changes to Discovery Schedule
2006-07-12	Case Management Order No. 9
2006-07-14	Delaware's Notice of Service of Second Set of Request for Production of Documents and Second Set of Interrogatories to New Jersey

2007-07-17	Case Management Order No. 10
2006-08-07	Delaware's Progress Report
2006-08-07	New Jersey's Progress Report
2006-08-08	Telephone Conference Transcript
2006-08-11	Delaware's Certificate of Service of First Request for Admissions to New Jersey
2006-08-11	Delaware's Certificate of Service of Supplemental Responses to New Jersey's First Set of Interrogatories
2006-08-14	New Jersey's Certificate of Service of First Request for Admissions to Delaware
2006-09-05	New Jersey's Progress Report
2006-09-05	Delaware's Progress Report
2006-09-06	Telephone Conference Transcript
2006-09-08	New Jersey's Certificate of Service of Responses to Delaware's First Requests for Admissions
2006-09-08	Delaware's Notice of Service of Responses to New Jersey's First Requests for Admissions
2006-09-19	New Jersey's Letter Request for Amendment of Case Management Plan
2006-09-19	Case Management Order No. 11
2006-09-21	Delaware's Notice of Deposition of Suzanne Dietrick
2006-09-21	Delaware's Notice of Deposition of Kevin Broderick
2006-09-21	Delaware's Notice of Deposition of David Q. Risilia
2006-09-21	Delaware's Notice of Deposition of Richard C. Castagna

2006-09-21	Delaware's Notice of Deposition of Stephen C. Whitney
2006-09-21	Delaware's Notice of Deposition of Ruth Ehinger
2006-09-21	Delaware's Notice of Deposition of Martin J. McHugh
2006-09-22	New Jersey's Notice of Deposition of William Streets
2006-09-22	New Jersey's Notice of Deposition of David Small
2006-09-22	New Jersey's Notice of Deposition of Kurt Reuther
2006-09-22	New Jersey's Notice of Deposition of Laura Herr
2006-09-22	New Jersey's Notice of Deposition of Philip Cherry
2006-09-22	New Jersey's Notice of Deposition of Sarah Cooksey
2006-09-22	New Jersey's Notice of Deposition of William Moyer
2006-09-29	New Jersey's Letter Request for Amendment of Case Management Order
2006-09-29	Delaware's Response to New Jersey's Letter Request for Amendment of Case Management Order
2006-09-29	New Jersey's Reply Email to Delaware's Response to New Jersey's Request for Amendment of Case Management Order
2006-10-02	New Jersey's Progress Report
2006-10-02	Delaware's Progress Report

2006-10-03	Telephone Conference Transcript
2006-10-05	Delaware's Letter re Case Management Schedule Issues
2006-10-05	New Jersey's Letter re Proposed Revisions to Case Management Plan
2006-10-06	Case Management Order No. 12
2006-10-12	Delaware's Re-Notice of Deposition of Suzanne Dietrick
2006-10-12	Delaware's Notice of Deposition of Beth Reddy
2006-10-12	Delaware's Notice of Deposition of Carl Wentzell
2006-10-12	Delaware's Re-Notice of Deposition of Ruth Ehinger
2006-10-12	Delaware's Re-Notice of Deposition of Richard C. Castagna
2006-10-13	Delaware's Letter Request for Modification of Case Management Order No. 12
2006-10-16	New Jersey's Responsive Letter to Delaware's Request for Modification of Case Management Order No. 12
2006-10-16	New Jersey's Notice of Deposition of David Blaasch
2006-10-16	New Jersey's Re-Notice of Deposition of Philip Cherry
2006-10-16	New Jersey's Re-Notice of Deposition of Sarah Cooksey
2006-10-16	New Jersey's Re-Notice of Deposition of Laura Herr

2006-10-16	New Jersey's Notice of Deposition of Robert Hutchins
2006-10-17	Case Management Order No. 13
2006-10-30	Letter of the Special Master to Parties Regarding Request for Oral Argument to be Included in November Progress Reports
2006-10-31	Delaware's Letter to Special Master Regarding Privilege Logs
2006-10-31	Delaware's Notice of Deposition of William E. Andersen
2006-10-31	Delaware's Notice of Deposition of James Johnson
2006-11-08	New Jersey's Progress Report
2006-11-08	Delaware's Progress Report with New Jersey's Privilege Log
2006-11-08	New Jersey's Current Privilege Log
2006-11-09	Telephone Conference Transcript
2006-11-09	Case Management Order No. 14
2006-11-13	Delaware's Letter Regarding New Jersey's Assertion of the Deliberative Process Privilege
2006-11-15	Delaware's Letter Regarding Resolution with New Jersey on Deliberative Process Privilege
2006-11-15	Special Master's Letter Response to Delaware's Letter Seeking to Hold in Abeyance its Motion to Compel Production of Documents from New Jersey Regarding New Jersey's Assertion of the Deliberative Process Privilege

2006-11-17	Letter from Delaware Regarding Location (Philadelphia) of Oral Argument on Dispositive Motions set for February 22, 2007
2006-11-17	Letter from Special Master to Counsel Regarding Oral Argument in Philadelphia
2006-11-27	New Jersey's Motion to Strike the Expert Report of Joseph Sax and to Strike the Legal Conclusions in the Expert Report of Carol Hoffecker, or, in the alternative, to Disregard Same as Evidence
2006-11-27	New Jersey's Letter-Brief in Support of its Motion for an Order to Strike as Evidence the Expert Report of Joseph Sax and Legal Conclusions in the Expert Report of Carol E. Hoffecker
2006-11-28	Delaware's Letter Seeking to File Response to New Jersey's Letter-Brief in Support of Motion to Strike
2006-11-29	Special Master's Letter to Counsel Regarding Responsive and Reply Briefing Schedule as to Motion to Strike and Scheduling of 12/8/06 Conference Call
2006-11-30	Letter of Mark E. Porada to Counsel
2006-12-04	Delaware's Letter-Brief in Opposition to New Jersey's Motion to Strike
2006-12-07	New Jersey's Reply to Delaware's Opposition to New Jersey's Motion to Strike
2006-12-07	CORRECTED New Jersey's Reply to Delaware's Opposition to New Jersey's Motion to Strike
2006-12-08	Telephone Conference Transcript

2006-12-08	Delaware's Email to Special Master Inquiring Whether BP is Involved in Maine Project
2006-12-11	Special Master's Response Regarding Responses to Delaware's Three Questions Regarding BP and Maine Project
2006-12-11	Delaware's Response Regarding Having Received Information and Passed Along to Clients
2006-12-11	Case Management Order No. 15
2006-12-13	Delaware's Response to Special Master Regarding Clients Not Having Further Questions
2006-12-22	New Jersey's Motion for Summary Judgment
2006-12-22	New Jersey's Brief in Support of Motion for Summary Judgment
2006-12-22	New Jersey's Appendix on Motion for Summary Judgment (Vols. 1-7)
2006-12-22	Delaware's Motion for Summary Judgment and Supporting Brief
2006-12-22	Delaware's Appendix on Cross-Motions for Summary Judgment (Vols. 1-7)
2006-12-26	Joint Statement of Facts
2006-12-27	New Jersey's AMENDED Table of Contents and Table of Authorities to Brief in Support of Motion for Summary Judgment
2007-01-04	Special Master's Letter to Counsel Regarding Submission of Proposed Form of Judgment
2007-01-12	New Jersey's Proposed Decree

2007-01-12	Delaware's Proposed Form of Judgment
2007-02-01	New Jersey's Brief in Opposition to Delaware's Motion for Summary Judgment
2007-02-01	Table of Contents to the Appendix of New Jersey on Motion for Summary Judgment
2007-02-01	New Jersey's Appendix on Motion for Summary Judgment (Volume 8)
2007-02-01	Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment
2007-02-01	Delaware's Appendix on Motion for Summary Judgment (Volume 8)
2007-02-02	New Jersey's Letter Regarding Proposal for Oral Argument
2007-02-02	Delaware's Letter Regarding Proposal for Oral Argument
2007-02-05	Case Management Order No. 16
2007-02-22	Transcript of Oral Argument
2007-04-12	Report of the Special Master
2007-04-12	Report of the Special Master Appendices

No. 134, Original

In The

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

REPORT OF THE SPECIAL MASTER

RALPH I. LANCASTER, JR.
Special Master

April 12, 2007

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vi

BACKGROUND 1

I. *New Jersey v. Delaware I* 2

II. The Compact of 1905 Between New Jersey and Delaware 6

III. *New Jersey v. Delaware II* 14

IV. The Present Controversy 17

PROCEEDINGS BEFORE THE COURT IN THIS ACTION 22

PROCEEDINGS BEFORE THE SPECIAL MASTER IN THIS ACTION 25

I. Preliminary Issues 25

II. Record Before the Special Master 27

ISSUES PRESENTED 29

ANALYSIS 32

I. The Riparian Lands and Riparian Rights Issues 33

A. Delaware's Ownership Up to the Low Water Mark on the New Jersey Side of the Delaware River 34

B. The Impact of the Boundary Resolution on the Authority of Each State Under the Compact 35

TABLE OF CONTENTS – Continued

Page

C. Riparian Lands: New Jersey's Authority to Make Grants, Leases, and Conveyances of Riparian Lands on the Eastern Side of the River 40

D. Riparian Rights: New Jersey's Authority to Make Grants, Leases, and Conveyances of Riparian Rights on the Eastern Side of the River 46

Conclusion: The Riparian Lands Issue and the Riparian Rights Issue 51

New Jersey has the authority to make grants, leases, and conveyances of riparian lands on the New Jersey side of the Delaware River within the twelve-mile circle only down to the low water mark.

Consistent with New Jersey's law of riparian rights, New Jersey riparian owners may construct, maintain and use improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

II. The Riparian Jurisdiction Issue 52

A. Construing "Riparian Jurisdiction of Every Kind and Nature" in the Context of the Compact as a Whole and Extrinsic Circumstances 53

1. The Scope of New Jersey's Riparian Jurisdiction 54

2. New Jersey's Claim of Exclusive Riparian Jurisdiction 61

a. The 1905 Compact 61

TABLE OF CONTENTS – Continued

Page

b. The New Jersey-New York Compact of 1834 65

B. Construing "Riparian Jurisdiction" in Light of the States' Course of Conduct Since Ratification of the Compact 68

1. Delaware's Common Law Riparian Oversight 69

2. Delaware's Subaqueous Land Statutes .. 70

3. Delaware's Coastal Zone Statutes 71

4. Delaware's Regulation of Projects On and Outward from the New Jersey Shore Within the Twelve-Mile Circle 74

5. New Jersey's Consent to Delaware's Involvement in Regulating Projects On and Outward from the New Jersey Shore Within the Twelve-Mile Circle 77

Conclusion: The Riparian Jurisdiction Issue 84

The preservation of "riparian jurisdiction" contained in Article VII of the Compact does not bestow upon New Jersey regulatory jurisdiction over all aspects of riparian improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark within the twelve-mile circle of the Delaware River; rather, New Jersey's jurisdiction outshore of that low water mark is limited to regulation of riparian rights associated with improvements extending onto Delaware's territory.

TABLE OF CONTENTS – Continued

Page

Delaware, as the sovereign owner of the land outshore of the low water mark on the eastern shore of the Delaware River within the twelve-mile circle, is entitled to exercise police power jurisdiction over improvements extending onto its territory, and accordingly New Jersey's riparian jurisdiction over such improvements is not exclusive.

III. The Estoppel Issue 86

Conclusion: The Estoppel Issue 91

Delaware is not estopped from challenging New Jersey's assertion of exclusive jurisdiction to regulate riparian improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

IV. The Prescription Issue 92

Conclusion: The Prescription Issue 98

New Jersey has not acquired exclusive regulatory jurisdiction over riparian improvements appurtenant to its shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle pursuant to the doctrine of prescription and acquiescence.

RECOMMENDATIONS 99

APPENDICES (separate volume)

APPENDIX A: Proposed Decree A-1

APPENDIX B: Compact of 1905 ..... B-1

APPENDIX C: Joint Statement of Facts C-1

TABLE OF CONTENTS – Continued

Page

APPENDIX D: Order on New Jersey's Motion to Strike Proposed Issues of Fact D-1

APPENDIX E: New Jersey's Index of Evidentiary Materials E-1

APPENDIX F: Delaware's Index of Evidentiary Materials F-1

APPENDIX G: New Jersey's Proposed Decree G-1

APPENDIX H: Delaware's Proposed Form of Judgment H-1

APPENDIX I: Table of Actions by Delaware and New Jersey Reflecting an Assertion of Jurisdiction or Authority Over the Eastern Shore of the Delaware River I-1

APPENDIX J: Table Comparing Similar Provisions in the New Jersey-New York Compact of 1834 and the New Jersey-Delaware Compact of 1905 ..... J-1

APPENDIX K: Docket of Proceedings Before the Special Master K-1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anjelino v. New York Times Co., 200 F.3d 73 (3d Cir. 1999) 88

Arizona v. California, 292 U.S. 341 (1934) 68

Arkansas v. Tennessee, 310 U.S. 563 (1940) 93

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 51

Bell v. New Jersey, 461 U.S. 773 (1983) 69

California v. Nevada, 447 U.S. 125 (1980) 93

Cummings v. City of Chicago, 188 U.S. 410 (1903) 49

Director, Office of Workers' Compensation Programs v. Rasmussen, 440 U.S. 29 (1979) 85

Dutton v. Strong, 66 U.S. 23 (1861) 49, 50

Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 125 S. Ct. 2611 (2005) 55

Georgia v. South Carolina, 497 U.S. 376 (1990) 93, 95

Head v. Amoskeag Manufacturing Co., 113 U.S. 9 (1885) 49

Henderson Bridge Co. v. City of Henderson, 173 U.S. 592 (1899) 34

Illinois v. Kentucky, 500 U.S. 380 (1991) 92, 97

Louisiana v. Mississippi, 202 U.S. 1 (1906) 93

Maryland v. Louisiana, 451 U.S. 725 (2002) 26

Massachusetts v. New York, 271 U.S. 65 (1926) 43

Mississippi v. Louisiana, 506 U.S. 73 (1992) 26

Nebraska v. Wyoming, 507 U.S. 584 (1993) 93

New Hampshire v. Maine, 532 U.S. 742 (2001) 87, 91

TABLE OF AUTHORITIES – Continued

Page

New Jersey v. Delaware, 205 U.S. 550 (1907)....2, 6, 12, 13, 39

New Jersey v. Delaware, 279 U.S. 825 (1929)..... 14

New Jersey v. Delaware, 280 U.S. 529 (1930)..... 14

New Jersey v. Delaware, 55 S. Ct. 934 (1933)..... 14

New Jersey v. Delaware, 291 U.S. 361 (1934)..... 1 & *passim*

New Jersey v. Delaware, 295 U.S. 694 (1935)..... 1, 16

New Jersey v. Delaware, 304 U.S. 590 (1938)..... 17

New Jersey v. Delaware, 305 U.S. 576 (1938)..... 17

New Jersey v. Delaware, 126 S. Ct. 713 (2005)..... 24

New Jersey v. Delaware, 126 S. Ct. 1184 (2006)..... 24

New Jersey v. New York, 523 U.S. 767 (1998) 36, 55, 84, 92-95

New York State Blue Cross Plans v. Travelers Insurance, 514 U.S. 645 (1995)..... 39

Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U.S. 659 (1878) 54

O'Connor v. United States, 479 U.S. 27 (1986) 69

Ohio v. Kentucky, 410 U.S. 641 (1973) 93

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 54, 67

Panhandle Eastern P. Line Co. v. State Highway Commission, 294 U.S. 613 (1935)..... 51

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)..... 39

Rhode Island v. Massachusetts, 37 U.S. 657 (1838) ... 35, 55

Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 69

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 55

TABLE OF AUTHORITIES – Continued

Page

Texas v. Florida, 306 U.S. 398 (1939) 32

Texas v. New Mexico, 482 U.S. 124 (1987) 36

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 69

United States National Bank v. Ind. Insurance Agents of America, 508 U.S. 439 (1993) 55

United States v. Alaska, 521 U.S. 1 (1997) 34, 42

United States v. Cherokee Nation, 480 U.S. 700 (1987) 43

United States v. River Rouge Improvement Co., 269 U.S. 411 (1926) 48, 50

United States v. Stuart, 489 U.S. 353 (1989) 68

United States v. Texas, 162 U.S. 1 (1896) 43

Virginia v. Maryland, 540 U.S. 56 (2003) ..... 36 & *passim*

Virginia v. Tennessee, 148 U.S. 503 (1893) 93

Weems Steamboat Co. v. People's Steamboat Co., 214 U.S. 345 (1909) 57

STATE CASES

Bailey v. Driscoll, 117 A.2d 265 (N.J. 1955) 3

Central R.R. of New Jersey v. Mayor of Jersey City, 56 A. 239 (N.J. Sup. Ct. 1903), *aff'd mem.*, 61 A. 1118 (N.J. 1905), *aff'd*, 209 U.S. 473 (1908) 67

City of Paterson v. East Jersey Water Co., 70 A. 472 (N.J. Ch. 1908) 41

TABLE OF AUTHORITIES – Continued

Page

City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004, 607 A.2d 1163 (Del. 1992) 3

Delaney v. Boston, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839) 69

Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association, 48 So. 643 (Fla. 1909) 50

Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 1882 WL 2713 (1882) 69

Keyport & Middletown Point Steamboat Co. v. Farmers Transport Co., 18 N.J. Eq. 511, 1866 WL 89 (Ct. Errors & Appeals 1866) 50

New York v. Central R.R. Co. of New Jersey, 42 N.Y. 283 (1870) 67

Obrecht v. National Gypsum Co., 105 N.W.2d 143 (Mich. 1960) 50

Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892 (Del. 1994) 71

State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275 (Conn. 1936) 50

State v. Korrer, 148 N.W. 617 (Minn. 1914) 50

State v. Reybold, 5 Harr. 484, 1854 WL 847 (Del. Ct. Gen. Sess. 1854) 69

Trustees, etc., of Town of Brookhaven v. Smith, 80 N.E. 665 (N.Y. 1907) 50

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905) 13
S. 4975, 59th Cong. (Mar. 13, 1906) 12
16 U.S.C. § 1451 71
16 U.S.C. §§ 1454-1455 71

STATE STATUTES

23 Del. Laws ch. 5 8
23 Del. Laws ch. 6 12
24 Del. Laws ch. 216 7
40 Del. Laws ch. 179 70
53 Del. Laws ch. 34 70
55 Del. Laws ch. 442, § 1 70
58 Del. Laws ch. 175 18
65 Del. Laws ch. 508 ..... 18, 71
Del. Code Ann. tit. 7, § 4520 (repealed 1966) 70
Del. Code Ann. tit. 7, §§ 6151-6159 (repealed 1986) 70
Del. Code Ann. tit. 7, §§ 7001-7013 18
Del. Code Ann. tit. 7, § 7003 71
Del. Code Ann. tit. 7, § 7004 18
Del. Code Ann. tit. 7, §§ 7201-7217 18
Del. Code Ann. tit. 7, § 7205 19
Del. Code Ann. tit. 7, § 7206(a) 71
Del. Code Ann. tit. 7, ch. 72 71

TABLE OF AUTHORITIES – Continued

Page

1851 N.J. Laws, p. 335 94
1869 N.J. Laws, ch. 383, N.J. Stat. Ann. § 12:3-2 94
1873 N.J. Laws p. 20 5
1905 N.J. Laws ch. 5 8
1905 N.J. Laws ch. 239 12

MISCELLANEOUS

Black's Law Dictionary (7th ed. 1999) 1
1 Farnham, Water and Water Rights § 62 (1904) 47
1 Farnham, Water and Water Rights § 63 (1904) 40, 50
1 Farnham, Water and Water Rights § 111 (1904) 47
1 Farnham, Water and Water Rights § 113 (1904) 50
2 Farnham, Water and Water Rights § 461 (1904) 47
2 Farnham, Water and Water Rights § 463a (1904) 41
2 Farnham, Water and Water Rights § 466 (1904) 49
3 Farnham, Water and Water Rights § 873 (1904) 50
Restatement (Second) of Torts § 843 ..... 40, 50
Webster's International Dictionary of the English Language (1898) 35, 40

REPORT OF THE SPECIAL MASTER

BACKGROUND

In this original action the States of New Jersey and Delaware make competing claims for the right to exercise regulatory jurisdiction over wharves and other improvements extending from the New Jersey shore into the Delaware River[1] within the so-called twelve-mile circle.[2] Each State claims exclusive jurisdiction over such improvements: New Jersey on the basis of the Compact of 1905 (the "Compact") entered into between the two States; Delaware principally on the basis of the decision of this Court in *New Jersey v. Delaware*, 291 U.S. 361 (1934). Delaware argues in the alternative that, even if Delaware's jurisdiction is not exclusive, New Jersey's jurisdiction is limited and also non-exclusive, resulting in the two States having overlapping jurisdiction.

This Report discusses the States' contentions and sets forth recommendations for the Court. Briefly stated, the Report recommends that the Court rule that, within the twelve-mile circle, (i) New Jersey's authority to convey riparian lands extends only to the boundary between the States at the low water mark[3] on the New Jersey side of

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[1] This Report sometimes refers to the Delaware River simply as the "River."

[2] The twelve-mile circle is defined as "the circle the radius of which is twelve miles, and the center of which is the building used prior to 1881 as the courthouse at New Castle, Delaware," the precise arcs of which are described more fully in *New Jersey v. Delaware*, 295 U.S. 694, 695-98 (1935). Unless otherwise indicated, all references in this Report to the eastern or New Jersey shore or side of the River refer to that portion within the twelve-mile circle.

[3] The low water mark of a river is "the point to which the water recedes at its lowest stage." Black's Law Dictionary at 1586 (7th ed.

(Continued on following page)

the River, (ii) the Compact preserves for riparian owners on New Jersey's shore of the River their riparian rights as defined under New Jersey law, including the right to construct wharves, piers and other improvements extending outshore of the boundary into Delaware's territory, (iii) outshore of the low water mark, New Jersey's authority to exercise jurisdiction over riparian improvements is limited by the Compact's preservation of only "riparian jurisdiction," not complete jurisdiction to the fullest extent of New Jersey's police powers; and (iv) outshore of that low water mark, Delaware, as the sovereign, retains overlapping jurisdiction to exercise its full complement of police powers to regulate riparian improvements extending from New Jersey's shore.

I. *New Jersey v. Delaware I.*

The dispute between New Jersey and Delaware over the common boundary the States share along the River is well known to the Court. On two prior occasions, New Jersey has invoked the Court's original jurisdiction in disputes concerning the same boundary.[4] As the Court observed on one of those prior occasions, "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them." *New Jersey v. Delaware II*, 291 U.S. at 376. Historically, New Jersey claimed to the middle of the River

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1999). References to the low water mark contained in this Report are intended to identify the low water mark on the eastern shore of the River unless otherwise noted.

[4] *New Jersey v. Delaware*, No. 1, Orig. (filed 1877) (hereinafter "*New Jersey v. Delaware I*"); *New Jersey v. Delaware*, No. 11, Orig. (filed 1929, sometimes identified by other Original docket numbers) (hereinafter "*New Jersey v. Delaware II*").

channel, while Delaware claimed to the low water mark on New Jersey's shore.

In the latter part of the nineteenth century, New Jersey and Delaware treated ownership of riparian lands differently in several respects. New Jersey claimed State ownership of navigable rivers, such as the River, up to the high water mark; Delaware claimed ownership only up to the low water mark. *See Bailey v. Driscoll*, 117 A.2d 265 (N.J. 1955) ("In this state it is settled that the title of the riparian owner extends only to the high-water mark."); *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, 607 A.2d 1163, 1168 (Del. 1992) ("title to riparian property extends from the upland to the low water mark"). As a result, to construct improvements extending into the River, a riparian owner in New Jersey had to obtain from the State a grant or conveyance of the land between low and high water marks. *See Bailey*, 117 A.2d at 268-69. Delaware did not make such grants or conveyances as it recognized title in riparian landowners extending from the shore out to the low water mark.

New Jersey sought to invoke this Court's original jurisdiction in the first instance after the States reached an impasse over disputed fishing rights on the River in the 1870s. In 1871, Delaware enacted a statute that required non-Delaware residents to get a $20 annual license from Delaware to fish in the River, while requiring Delaware residents to pay only $5 for the same license.[5] Roughly a year later, on May 2, 1872, Delaware arrested several New Jersey citizens at gunpoint and impounded their boats

[5] An Act for the Protection of Fishermen (Mar. 28, 1871) (Delaware's Appendix ("DA") 913-16).

because they were fishing east of the middle of the River without obtaining the required Delaware license.[6] Not surprisingly, those arrests precipitated a heated exchange between the States.

On May 8, 1872, only six days after the arrests, New Jersey's Governor issued a proclamation stating: "I hereby give notice and proclaim that the State of New Jersey claims jurisdiction over that part of the river Delaware, between the States of Delaware and New Jersey, which is easterly of the middle line of said river, and further claims that all persons who conform to the fishing laws of the State of New Jersey have the right to fish on the eastern side of said river, without permission or license of any other State."[7]

Less than a week later, on May 14, 1872, Delaware's Governor responded by stating that "[t]he State of Delaware does not regard the question as to her jurisdiction over the said river and bay, as claimed by her, as an open question," and that Delaware's jurisdiction is "exclusive over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle, and is regarded by said State as paramount to any which may be claimed by any other State."[8]

Over the ensuing years, the States attempted to defuse the dispute over fishing rights by appointing

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[6] *See* Report of Carol E. Hoffecker ("Hoffecker Rep.") at 14-16 (DA 4213).

[7] Proclamation of New Jersey Gov. Joel Parker (May 8, 1872) (DA 39).

[8] Letter from Delaware Gov. James Ponder to New Jersey Gov. Joel Parker (May 14, 1872) (DA 929-30).

commissioners to negotiate an interstate compact.[9] Unfortunately, the commissioners were unable to reach an agreement to resolve the ongoing dispute. Delaware eventually revoked the authority of its commissioners in March 1875.[10]

In 1877, New Jersey commenced its first original action against Delaware before the Court in an attempt to establish the disputed boundary in the River. In its Complaint, New Jersey asserted that its "part of the bed of said river extends from the New Jersey shore thereof to the middle of said river."[11] Promptly thereafter, the Court issued a preliminary injunction enjoining Delaware from

> imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey, and from requiring them, or any of them, to take a license from or under the State of Delaware for right or authority to fish in the river Delaware, as they have heretofore been accustomed to do . . . and from arresting, imprisoning, trying, fining, or in any manner punishing, or seizing, holding or selling any property of any citizen or resident of New Jersey for fishing in said river as aforesaid, until this Court shall make other order to the contrary.[12]

That action thereafter "slumbered for many years," *New Jersey v. Delaware II*, 291 U.S. at 376, while the

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[9] Joint Resolutions by Delaware Legislature, Jan. 30, 1873 (DA 40); 1873 N.J. Laws p. 20 (DA 826-27).

[10] Joint Resolution by Delaware Legislature, Mar. 26, 1875 (DA 48).

[11] New Jersey's Complaint in *New Jersey v. Delaware I* (DA 20).

[12] Order dated March 26, 1877 in *New Jersey v. Delaware I* (DA 67-68).

States again entered into negotiations over language for an interstate compact. Thirty years later, in April 1907, following the ratification of the Compact of 1905, this Court, at New Jersey's request, dismissed its Complaint without prejudice. *See New Jersey v. Delaware*, 205 U.S. 550 (1907) (hereinafter "*New Jersey v. Delaware I*").

II. The Compact of 1905 Between New Jersey and Delaware.

After the Court entered the preliminary injunction in *New Jersey v. Delaware I*, the case remained pending and the States' dispute remained unresolved until 1903. That year, the Attorneys General for both States reported to their respective Governors that they were in agreement that an amicable resolution of the controversy should again be attempted through commissioners.[13] Both States thereafter appointed commissioners.[14]

The commissioners met in Philadelphia on March 12 and 14, 1903, and agreed upon a compact that was presented

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[13] John Hunn, Governor of Delaware, Message to Delaware General Assembly and Joint Resolution of the Delaware General Assembly (Jan. 31, 1903) (DA 1065); Letter from Franklin Murphy, Governor of New Jersey, to the New Jersey Legislature (Mar. 3, 1903) (DA 1081).

[14] Delaware's commissioners were Governor John Hunn, Attorney General Herbert H. Ward and George H. Bates, its *New Jersey v. Delaware I* counsel. Journal of the Senate of the State of Delaware, pp. 896-903 (Mar. 16, 1903) (DA 1104-05, 1113). New Jersey's commissioners were Governor Franklin Murphy, Attorney General Thomas N. McCarter and Chancery Clerk Edward C. Stokes (who later became Governor of New Jersey in 1905). Acts, Votes and Proceedings, Correspondence, Reports, Resolutions of the 47th New Jersey's General Assembly, Trenton (Nov. 7, 1820 – Apr. 16, 1929) (DA 835-36).

to their respective legislatures on March 16, 1903.[15] The New Jersey legislature approved that 1903 version of the compact shortly thereafter; however, the Delaware legislature rejected it, and it therefore did not go any further.[16]

At the request of both States, the Court appointed a special examiner in another attempt to resolve the parties' differences.[17] The examiner conducted a series of hearings commencing on November 7, 1903, and continuing periodically into 1905. When nothing was resolved as a result of the examiner's efforts, in February 1905 the States again appointed commissioners to conduct negotiations.[18] The commissioners agreed upon a new compact that essentially copied the terms of the proposed 1903 compact, only amending the 1903 draft to make the compact also applicable below the twelve-mile circle in the River and Bay and to provide for placement of monuments marking the

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[15] Journal of the Senate of the State of Delaware, pp. 896-903 (Mar. 16, 1903) (DA 1103); Minutes of the New Jersey General Assembly, pp. 549-50 (Mar. 16, 1903) (DA 1109).

[16] Letter from the Attorney General of New Jersey to George H. Bates (Apr. 2, 1903) (DA 1123); Letter from Commissioners of the State of Delaware to Commissioners of the State of New Jersey (Mar. 28, 1903) (DA 1117).

[17] Joint Stipulation, *New Jersey v. Delaware I* (May 28, 1903) (DA 171).

[18] Delaware reappointed former Attorney General Herbert H. Ward, and the State's counsel George H. Bates and also appointed Governor Preston Lea and Attorney General Robert H. Richards. 24 Del. Laws ch. 216 (1905) (DA 1169-70). New Jersey reappointed Governor Edward C. Stokes and former Governor Franklin Murphy, and appointed Attorney General Robert H. McCarter (brother of Thomas McCarter, one of the prior commissioners) and attorney Chauncey G. Parker. Joint Resolution of the New Jersey Senate and General Assembly (Feb. 14, 1905) (New Jersey's Appendix ("NJA") 1315a).

division of the River and Bay.[19] The States thereafter approved the Compact: Delaware on March 20, 1905, and New Jersey on the following day.[20]

The Compact contains a preamble and nine articles. The preamble states that the States' commissioners had been appointed "for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States."[21] The preamble further states that "a controversy hath heretofore existed between the States of New Jersey and Delaware relative to the jurisdiction of such portion of the Delaware River as is included within the circle of twelve-mile radius," and that "it is the mutual desire of said States to so settle and determine such controversy as to prevent future complications arising therefrom."[22] Finally, the preamble recites that the Compact was entered into with the aim of achieving an "amicable termination of said suit between said States now pending in the Supreme Court of the United States, and the final adjustment of all controversies relating to the boundary line between said States, and to their respective rights in the Delaware River and Bay."[23] Nevertheless, the ultimate question of the precise boundary line between the States was not addressed in the Compact and thus was left unresolved.

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[19] Compact, attached hereto as Appendix B.

[20] 23 Del. Laws ch. 5 (1905) (NJA 6a); 1905 N.J. Laws ch. 5 (1905) (NJA 262a).

[21] Compact Preamble, App. B-1.

[22] *Id.*

[23] *Id.*

Other material provisions of the Compact provide the following.

Article I states that:

> Criminal process issued under the authority of the State of New Jersey against any person accused of an offense committed upon the soil of said State, or upon the eastern half of said Delaware River, or committed on board of any vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of New Jersey against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the New Jersey shore to low-water mark on the Delaware shore, except upon Reedy and Pea Patch islands, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of Delaware, or the shores of said islands, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of Delaware.[24]

Article II provides comparable criminal process authority for Delaware, stating:

> Criminal process issued under the authority of the State of Delaware against any person accused of an offense committed upon the soil of said State, or upon the western half of said Delaware River, or committed on board of any

[24] *Id.*

> vessel being under the exclusive jurisdiction of that State, and also civil process issued under the authority of the State of Delaware against any person domiciled in that State, or against property taken out of that State to evade the laws thereof, may be served upon any portion of the Delaware River between said States from low-water mark on the Delaware shore to low-water mark on the New Jersey shore, unless said person or property shall be on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto, or unless such person shall be under arrest or such property shall be under seizure by virtue of process or authority of the State of New Jersey.[25]

Article III addresses the States' fishing rights, providing:

> The inhabitants of the said States of Delaware and New Jersey shall have and enjoy a common right of fishery throughout, in, and over the waters of said river between low-water marks on each side of said river between the said States, except so far as either State may have heretofore granted valid and subsisting private rights of fishery.[26]

Article IV required the States to appoint commissioners to meet "for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two States."[27] Article IV

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[25] *Id.*

[26] *Id.*

[27] *Id.*

further provides that, "Each State shall have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for."[28]

Article V also addresses fishing rights, and states:

> All laws of said States relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery hereinabove mentioned shall continue in force in said respective States until the enactment of said concurrent legislation as herein provided.[29]

Article VI addresses the States' rights with respect to oysters and other shellfish in the disputed territory, providing:

> Nothing herein contained shall affect the planting, catching, or taking of oysters, clams, or other shell fish, or interfere with the oyster industry as now or hereafter carried on under the laws of either State.[30]

Of particular note to the instant dispute, Article VII states:

> Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.[31]

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

As discussed below, the scope of the States' "riparian jurisdiction" contained in Article VII is at the heart of the present controversy.

Article VIII provides:

> Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.[32]

Finally, Article IX provided that the Compact would be submitted to the States' legislatures for approval, then to Congress for ratification, and that upon ratification "it shall be and become binding in perpetuity upon both of said States" and *New Jersey v. Delaware I* "shall be discontinued . . . without prejudice."[33]

The States appointed commissioners to consider adoption of uniform fishing laws under Article IV.[34] The States also submitted the Compact to Congress for ratification and the Senate approved the Compact.[35] The States asked the House of Representatives to defer taking any action on the Compact, pending the adoption of uniform fishing laws, and further asked the Court to stay proceedings in *New Jersey v. Delaware I* pending congressional ratification of the Compact.[36]

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[32] *Id.*

[33] *Id.*

[34] 23 Del. Laws ch. 6 (1905) (NJA 2a); 1905 N.J. Laws ch. 239 (NJA 268a).

[35] S. 4975, 59th Cong. (Mar. 13, 1906) (DA 1190).

[36] Joint Application for Stay in *New Jersey v. Delaware I* (DA 190).

The States' fishing law commissioners reported in January 1907 that they had drafted the uniform laws contemplated by Article IV of the Compact, and suggested that their respective Governors seek final congressional ratification.[37] The States did so, and Congress completed ratification of the Compact on January 24, 1907. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905).[38] Following congressional ratification of the Compact, and on motion of New Jersey, the Court issued an Order on April 15, 1907 in *New Jersey v. Delaware I*, directing that the "Bill of complaint [be] dismissed without costs and without prejudice." *New Jersey v. Delaware I*, 205 U.S. 550 (1907).

However the comparable fishing laws adopted by both States in 1907 were not identical or "uniform" as contemplated by Article IV.[39] Over the course of many ensuing

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[37] Letter from Alexander B. Cooper, President, and William S. Hilles, Delaware Commissioners, to Robert H. Richards, Attorney General of Delaware (Jan. 19, 1907) (DA 1293); Letter from Robert H. McCarter, Attorney General of New Jersey, to Edward C. Stokes, Governor of New Jersey (Jan. 9, 1906) (DA 1295); Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 9, 1907) (DA 1297); Letter from Senator William J. Bradley of New Jersey to Alexander B. Cooper, President, Delaware Commissioners (Jan. 9, 1907) (DA 1299); Letter from John B. Avis, New Jersey State Senator, to Walter H. Hayes, Secretary, Delaware Commissioners (Jan. 7, 1907) (DA 1301).

[38] A copy of the Act is found at DA 11.

[39] Hoffecker Rep. 45-47 (DA 4213); Letter from Alexander B. Cooper, President, Delaware Commissioners to Walter H. Hayes, Secretary, Delaware Commissioners (Feb. 28, 1907) (DA 1871); Letter from Alexander B. Cooper, President, Delaware Commissioners to Walter H. Hayes, Secretary, Delaware Commissioners (Mar. 2, 1907) (DA 1873); Letter to Walter H. Hayes, Secretary, Delaware Commissioners (Mar. 7, 1907) (DA 1876).

years, the States endeavored to draft and adopt a uniform set of fishing laws for the River, but failed to do so.[40]

III. *New Jersey v. Delaware II.*

Notwithstanding the ratification of the Compact of 1905, the States' relations on the Delaware River continued in much the same fashion they had followed over the prior century. In 1925 and 1926, the States wrangled over disputed ownership of an oyster bed in the River below the twelve-mile circle. The States again appointed commissioners in an attempt to resolve the boundary dispute, but they could not reach agreement.[41]

In 1929, New Jersey initiated its second original action against Delaware. The Court granted New Jersey leave to file a Bill of Complaint to determine the boundary along the States' common border. *New Jersey v. Delaware II*, 279 U.S. 825 (1929). On motion of New Jersey, the Court appointed a Special Master, *New Jersey v. Delaware II*, 280 U.S. 529 (1930). He conducted hearings and submitted a Report on October 9, 1933. *See New Jersey v. Delaware II*, 55 S. Ct. 934 (1933). The Special Master recommended that the Court hold that, within the twelve-mile circle, Delaware owned up to the low water mark on the eastern or New Jersey side of the River. He also recommended that, below the twelve-mile circle, the Court locate the States' common boundary in the middle of the navigable channel of the River. *See id.* at 966. Both States filed exceptions to the Special Master's Report.

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[40] *See generally* correspondence found at DA 1891-2024.

[41] *See generally* correspondence found at DA 2025-78.

In this second action, the Court was asked to resolve two issues with respect to the boundary separating the States along the River. First, the States pressed their competing claims to "the title to the bed or subaqueous soil of the Delaware river within a circle of twelve miles about the town of New Castle." Delaware asserted it was "the owner of the entire bed of the river within the limits of this circle up to low-water mark on the east or New Jersey side." *New Jersey v. Delaware II*, 291 U.S. at 363. New Jersey claimed "to be the owner up to the middle of the channel." *Id.* at 364. Second, the States asked the Court to resolve "the boundary line between the two states in the river below the circle and in the bay below the river." *Id.* Delaware claimed "the division at the geographical center, an irregular line midway between the banks or shores." *Id.* New Jersey argued that the boundary was defined by the thalweg.[42] *See id.*

The Court thoroughly explored the historical origins of Delaware's claim to a twelve-mile circle centered on the town of New Castle – which extends to the New Jersey shore of a portion of the River – "through deeds going back two and a half centuries and more," originating with the delivery of a deed of feoffment from the Duke of York to William Penn on August 24, 1682. *Id.* at 364. The Court noted, and briefly addressed, the Compact. It observed that the Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *Id.* at 377-78. But, aside from

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[42] The thalweg is "the track taken by boats in their course down the stream, which is that of the strongest current." *New Jersey II*, 291 U.S. at 379.

noting the existence of the Compact, the Court had little need to address its specifics any further in *New Jersey v. Delaware II* because Article VIII makes clear that the Compact was not intended to affect or resolve the States' territorial boundary within the River. *See id.* at 378. Thus, the Court concluded that the Compact had no bearing on determining the States' respective ownership claims in the River and its subaqueous soil.

For present purposes it is not necessary to recount the entirety of the Court's historical review of Delaware's claims to the twelve-mile circle. *See id.* at 364-78. Suffice it to say that the Court conclusively held that "[w]ithin the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the state of Delaware, subject to the Compact of 1905." *Id.* at 378, 385.

With regard to the disputed boundary below the twelve-mile circle, the Court held that "the true boundary between the [States] will be adjudged to be the middle of the main ship channel in Delaware river and bay." *Id.* at 378. This holding is not in dispute in this action.

The Court entered a Decree on June 3, 1935, setting the precise boundary. *See New Jersey v. Delaware II*, 295 U.S. 694 (1935). Again, the Decree was "made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." *Id.* at 699.

Thus, since 1934 the location of the boundary between New Jersey and Delaware has no longer been in dispute. Within the twelve-mile circle, Delaware owns title to the River and subaqueous soil up to the low water mark on the New Jersey side of the River, "subject to the Compact of

1905." *New Jersey v. Delaware II*, 291 U.S. at 385. Each of six municipalities in New Jersey has one boundary all or partially at the low water mark of the River within the twelve-mile circle, thus bordering directly on Delaware's territory: Logan Township in Gloucester County; and Oldmans Township, Penns Grove Borough, Carneys Point Township, Pennsville Township and Elsinboro Township, all within Salem County.[12]

Nearly three years later, in May 1938, New Jersey sought leave to file a petition for rehearing of the Court's decision. The Court granted the motion for leave to submit the petition but denied the petition for rehearing summarily. *New Jersey v. Delaware II*, 304 U.S. 590 (1938). In December 1938, New Jersey filed another motion for leave to file a second petition for rehearing; the Court denied the motion. *New Jersey v. Delaware II*, 305 U.S. 576 (1938).

IV. The Present Controversy.

Not surprisingly, given the long history of boundary and jurisdictional disputes along their common border, New Jersey and Delaware again find themselves embroiled in a dispute over their rights on (and under) the River. In the decades following this Court's decision in *New Jersey v. Delaware II*, both States engaged in a series of activities – through regulatory actions, grants and leases – on the New Jersey side of the River. Of relevance in the present dispute, New Jersey objects to Delaware's attempts to regulate a proposed development on the New Jersey side of the River.

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[12] Affidavit of Richard Castagna ("Castagna Aff.") ¶ 10 (NJA 383a).

New Jersey points to the fact that, until the 1970s, Delaware made few, if any, attempts to regulate matters on the eastern shore of the River. Moreover, New Jersey asserts that, during those same years, it continued issuing various grants and leases of riparian lands and otherwise regulating riparian improvements on its own shore.[44] From this course of conduct, New Jersey argues that Delaware's recent interference on the eastern shore of the River is contrary to the States' intentions when they adopted the Compact.

Delaware, in turn, points to its enactment of various statutes in the 1970s and 1980s designed to protect Delaware's coastal waters and lands. It asserts that, because it holds title up to the low water mark on the New Jersey shore, its jurisdiction under those acts reaches to the New Jersey side of the River.[45] New Jersey counters

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[44] A table summarizing various actions taken by both States relating to riparian improvements and regulations along the River is attached hereto as Appendix I.

[45] For instance, in 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (the "DCZA"). The DCZA seeks, in broad terms, "to control the location, extent and type of industrial development in Delaware's coastal areas." Del. Code Ann. tit. 7, § 7001. The DCZA further provides that "offshore bulk product transfer facilities represent a significant danger of pollution to the coastal zone and generate pressure for the construction of industrial plants in the coastal zone, which construction is declared to be against public policy." *Id.* Under the statute, "control of industrial development other than that of heavy industry in the coastal zone of Delaware" occurs "through a permit system" overseen by the State Department of Natural Resources and Environmental Control ("DNREC"). *Id.*; *see also* Del. Code Ann. tit. 7, § 7004.

Delaware also adopted the Subaqueous Lands Act in 1986, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (the "DSLA"). The DSLA provides in part that no person "shall deposit material upon or remove or extract materials from, or construct, modify,

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that Delaware has applied these laws to several projects on New Jersey's shore without jurisdiction to do so.

The States managed to coexist for years in spite of the ongoing dispute over the scope of Delaware's jurisdiction to apply and enforce its own laws with respect to development outwards from the New Jersey shore. However, the simmering dispute came to a boil in 2005 when Delaware denied various permits for one particular project on New Jersey's shore, leading to the present action.

The project is construction of a liquefied natural gas ("LNG") facility to be operated by Crown Landing, LLC, a wholly owned indirect subsidiary of British Petroleum ("BP").[46] The proposed Crown Landing facility would include an LNG plant and storage facility, and other structures in New Jersey and a pier and related structures that extend into Delaware.[47] The portion of the proposed Crown Landing facility to be located in Delaware would include an LNG transfer system installed on the unloading platform in the River to transfer the LNG from ships to three 150,000-cubic-meter storage tanks located in New Jersey.[48] Construction of the Crown Landing facility would require the dredging of 1.24 million cubic yards of

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repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval" from the DNREC. Del. Code Ann. tit. 7, § 7205.

[46] Joint Statement of Facts ("JSF") ¶ 150, attached hereto as Appendix C.

[47] *Id.* ¶ 151.

[48] *Id.* ¶ 152.

subaqueous soil, affecting approximately 29 acres of the bed of the River within Delaware's territory.[49]

On September 27, 2004, Crown Landing, LLC requested permission from DNREC's Wetlands and Subaqueous Lands Section to drill geotechnical test borings in the River.[50] On December 7, 2004, BP applied to DNREC for a status determination under the DCZA for the proposed Crown Landing project.[51] On January 7, 2005 – over three months after beginning the Delaware approval process – BP commenced the permit process in New Jersey, as well, by filing a Waterfront Development Application with NJDEP's Office of Dredging and Sediment Technology, presumably in light of the fact that the structure would be built on both New Jersey's and Delaware's lands.[52] On February 3, 2005, DNREC issued a status decision that the proposed Crown Landing project was a prohibited "offshore bulk transfer facility" as well as a prohibited "heavy industry use" under the DCZA.[53]

On February 15, 2005, BP, on behalf of Crown Landing, LLC, filed an administrative appeal to the Delaware Coastal Zone Industrial Control Board ("CZICB").[54] On April 14, 2005, the CZICB affirmed DNREC's status decision that BP's Crown Landing project was a bulk product transfer facility prohibited under the DCZA.[55]

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[49] *Id.* ¶ 153.

[50] *Id.* ¶ 150.

[51] *Id.* ¶ 154.

[52] *Id.* ¶ 155.

[53] *Id.* ¶ 156.

[54] *Id.* ¶ 157.

[55] *Id.* ¶ 158.

Thus, Delaware has declined to issue any permits under the DCZA for the proposed project. BP did not appeal the CZICB's decision, thereby rendering it a final determination.[56] Therefore, if Delaware is correct in its assertion that it has regulatory jurisdiction over projects extending from the New Jersey shore outshore of the low water mark, BP and Crown Landing, LLC will be precluded from constructing the proposed LNG facility.

Following Delaware's refusal to grant the requested permits to Crown Landing, LLC, the States engaged in a series of correspondence. New Jersey considered a range of legislative resolutions and threats to withdraw state pension funds from Delaware banks. Delaware considered legislation authorizing the National Guard to step in to protect Delaware's borders from encroachment. And one New Jersey legislator even explored the seaworthiness of the decommissioned battleship New Jersey, currently docked as a museum on the Camden waterfront, in the event the State was forced to repel an armed invasion by Delaware.[57] Despite – or perhaps because of – these diverse responses to the current dispute, the States have been unable to break their impasse.

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[56] *Id.*

[57] New Jersey's Motion to Reopen and for Supplemental Decree at 16-17 and accompanying Appendix at 155a-164a, 266a-268a; *see also* NJA 1109a-1116a; Press Release of New Jersey Assemblyman John Burzichelli, dated January 20, 2006, found at http://politics.nexcess.net/pressrelease/2006/01/assemblyman_john_burzichelli_2.html (last viewed April 5, 2007).

PROCEEDINGS BEFORE THE COURT IN THIS ACTION

New Jersey commenced this action on July 28, 2005, by filing with the Court a Motion to Reopen and for a Supplemental Decree. New Jersey sought leave to file a petition to reopen *New Jersey v. Delaware II*, to obtain a supplemental decree enforcing New Jersey's alleged riparian rights and jurisdiction under Article VII of the Compact. New Jersey sought a declaration that Article VII gives New Jersey exclusive riparian jurisdiction over improvements extending outshore of the low water mark on New Jersey's shore. New Jersey further sought to have Delaware enjoined from asserting jurisdiction over such improvements.[58] Alternatively, New Jersey sought leave to file a new Bill of Complaint.[59]

In essence, New Jersey argued that under Article VII of the Compact it has exclusive jurisdiction over projects appurtenant to its shores. It maintained that Delaware is without jurisdiction to regulate projects such as the proposed Crown Landing LNG facility to be built on and outward from the New Jersey shore. New Jersey therefore asked that the Court "declare that Article VII of the Compact of 1905 grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the River within the Twelve-Mile Circle, free of regulation by Delaware." It asked that the Court "enjoin Delaware from interfering with the exercise of New Jersey's riparian jurisdiction."[60]

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[58] *Id.* at 1-2.

[59] *Id.* at 34.

[60] *Id.* at 35.

Delaware opposed New Jersey's motion on several grounds. Delaware argued that the Court "lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two States."[61] Further, Delaware argued on the merits that New Jersey's reading of Article VII is incorrect, because New Jersey does not have exclusive jurisdiction to "approve projects that encroach on Delaware submerged lands without any say by Delaware."[62]

In the alternative, Delaware asked the Court to appoint a Special Master to take evidence on, among other things, "each State's riparian rights within the twelve-mile circle prior to the 1905 Compact, the intent of each State in signing the Compact with respect to riparian rights, and the course of performance during the 100 years since the Compact was approved."[63] Delaware sought the appointment of a Special Master to "ensure that Delaware's right to pursue discovery on these complex, historical issues is protected."[64] Substantively, Delaware asked the Court to "dismiss New Jersey's pleading for lack of jurisdiction."[65] Alternatively, Delaware asked the Court to "deny New Jersey's request for declaratory and injunctive relief because Delaware has the right, as a sovereign and under the 1905 Compact, to regulate the manner in which BP intends to construct a massive LNG bulk product transfer facility within Delaware's territory."[66]

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[61] Delaware's Opposition to New Jersey's Motion to Reopen and for Supplemental Decree at 21.

[62] *Id.*

[63] *Id.* at 22.

[64] *Id.*

[65] *Id.* at 78.

[66] *Id.*

By Order dated November 28, 2005, the Court denied New Jersey's Motion to Reopen and for a Supplemental Decree. It granted New Jersey's alternative request for leave to file a Bill of Complaint. The Court further ordered Delaware to file an answer within 30 days, docketing the new proceeding as No. 134, Original. *See New Jersey v. Delaware*, 126 S. Ct. 713 (2005). Delaware answered the Bill of Complaint on December 28, 2005. In its Answer, Delaware included a prayer for relief, asking the Court to enter judgment "[d]eclaring that Delaware has the right . . . to enforce its laws, including its coastal zone, environmental protection, and natural resources statutes," and is entitled to "enforcement of its laws as they apply to proposals to construct bulk transfer facilities and/or heavy industry, or otherwise to use or to disturb the subaqueous soil within Delaware's coastal zone."[67] Delaware further requested that the Court enter judgment "[e]njoining New Jersey . . . from interfering with the rights of Delaware of, in or over the Delaware River within the twelve-mile circle, including without limitation the subaqueous soil thereof."[68]

Delaware also formally moved for appointment of a Special Master.[69] By Order dated January 23, 2006, the Court granted Delaware's motion and appointed the undersigned as Special Master. *See New Jersey v. Delaware*, 126 S. Ct. 1184 (2006).

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[67] Delaware's Answer at 12.

[68] *Id.*

[69] Delaware's Motion for Appointment of Special Master.

PROCEEDINGS BEFORE THE SPECIAL MASTER IN THIS ACTION

I. Preliminary Issues.

Before the principal issues for decision in this case were framed, the parties filed several preliminary motions.[70] With one exception, those motions dealt with scheduling and other ministerial matters. The only substantive motion addressed the scope of the factual issues to be explored by the States in discovery.

Case Management Order No. 1 directed the States to submit lists of the issues they foresaw as appropriate for resolution by the Special Master. New Jersey was given leave to file a motion addressing the relevance and/or admissibility of the issues identified by Delaware. New Jersey filed such a motion, seeking to strike several of the proposed issues of fact identified by Delaware. Delaware had identified, as a factual issue to be explored through discovery, the relationship between BP's commercial interests in obtaining regulatory approval for the Crown Landing project and New Jersey's decision to file this original action. Delaware's theory was that, depending on whether or to what degree BP influenced New Jersey's decision to file, BP might be deemed the real party in interest, rather than New Jersey, such that this Court might lack original jurisdiction.

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[70] A copy of the Docket of Proceedings Before the Special Master is attached hereto as Appendix K. The docket and electronic copies of all public filings included therein are accessible on the Internet at http://www.pierceatwood.com/custompagedisplay.asp?Show=2.

By Order dated June 13, 2006, New Jersey's motion was granted in part and denied in part. A copy of that Order is attached at Appendix D. It was granted as to Delaware's attack on the Court's jurisdiction because (i) the Court had implicitly determined that New Jersey is a proper party when it granted New Jersey's motion for leave to file the Bill of Complaint;[71] (ii) the likelihood that this Court had already made that determination was buttressed by the fact that, in response to New Jersey's Petition to Reopen No. 11, Original, Delaware argued that the Court "lacks jurisdiction over this dispute, which in reality is between BP and Delaware, not two states,"[72] and thus the Court must have considered the matter in deciding to grant New Jersey leave to file; and (iii) it is apparent in any event that New Jersey is a real party in interest, regardless of the influence that BP might have had on New Jersey's decision to commence this suit. It therefore was inappropriate for the Special Master to reconsider the Court's implicit finding that BP's alleged role in New Jersey's pursuit of this action was insufficient to defeat the Court's original jurisdiction.[73]

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[71] *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 740 n.16 (2002) (By "granting plaintiffs' motions for leave to file, we rejected [defendant's] motions that the case should be dismissed," because "[u]sually, when we decline to exercise our original jurisdiction, we do so by denying the motion for leave to file."); *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) ("Determining whether a case is 'appropriate' for our original jurisdiction involves an examination of . . . 'the nature of the interest of the complaining State. . . .'") (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)).

[72] Delaware's Opposition to New Jersey's Motion to Reopen and for Supplemental Decree at 21.

[73] Delaware also identified as an issue of law to be resolved in this action whether "the failure of the States to enact the uniform fishing

(Continued on following page)

II. Record Before the Special Master.

Under the parameters set forth in the Case Management Plan and pursuant to various Case Management Orders, the parties engaged in discovery spanning about nine months. Following the completion of discovery, in order to frame the legal issues and argue their respective positions, the States presented cross motions for summary judgment and oppositions and replies thereto, as well as evidentiary material supplemental to their briefs. The parties submitted a total of eighteen volumes of historical documents, correspondence, reports and secondary source materials, adding up to nearly 6,500 pages. Indices of those materials, prepared by the States, are provided in Appendices E and F attached hereto.

Following receipt of the summary judgment motions, the parties were instructed to submit proposed forms of judgment specifying in succinct fashion the precise relief sought by each party. In response, New Jersey submitted a proposed decree by which the Court would order that:

> 1. The Compact of 1905 between the State of New Jersey and the State of Delaware grants exclusive State riparian jurisdiction to New Jersey to regulate all aspects of the construction, maintenance and use of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle that extend

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laws required by Article IV of the 1905 Compact renders the Compact unenforceable." *See* Delaware's Issues of Fact and Law at 3 (Feb. 17, 2006). Delaware has not raised that issue in its pending summary judgment motion, and has stated that it "takes no position in this litigation" on that issue, and therefore appears to have waived any argument that the Compact is unenforceable. Delaware's Opposition to New Jersey's Motion for Summary Judgment at 46 n.42.

outshore of the mean low water line. The Compact also grants New Jersey exclusive State jurisdiction over vessels using or attaching to such improvements.

2. The Compact of 1905 authorizes New Jersey to convey those grants, leases, licenses or other interests in the bed of the Delaware River within the Twelve Mile Circle outshore of the mean low water line that are reasonably related to the exercise of its jurisdiction under paragraph 1.

3. Delaware is enjoined from requiring any permit, license, lease, certification, determination or other authorization for the construction, maintenance or use [of] a riparian improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve Mile Circle.[74]

Delaware submitted a proposed form of judgment by which the Court would order that:

1. New Jersey's request for relief is denied and its complaint is dismissed with prejudice.

2. Under the 1905 Compact and this Court's decision in *New Jersey v. Delaware*, 291 U.S. 361 (1934), New Jersey lacks any jurisdiction within the twelve-mile circle to regulate proposed or existing improvements on Delaware lands, regardless of whether they originate in New Jersey; or to grant, lease, or convey Delaware lands. Accordingly, BP's proposed Crown Landing facility is subject to regulation under the Delaware Coastal Zone Act.

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[74] New Jersey's Proposed Decree, attached hereto as Appendix G. New Jersey's proposal also included provisions for payment of the Special Master's expenses and retention of the Court's jurisdiction.

3. New Jersey is enjoined within the twelve-mile circle from exercising any riparian jurisdiction beyond its border with Delaware and from granting, leasing, or conveying Delaware lands.[75]

Thus, in summary, the States essentially seek mirror-image relief. New Jersey asks the Court to declare that it has exclusive jurisdiction to convey lands and regulate improvements appurtenant to the New Jersey shore beyond the low water mark. Delaware asks the Court to declare that New Jersey lacks jurisdiction either to convey lands or to regulate any improvements appurtenant to the New Jersey shore beyond the low water mark.

Oral argument on the States' cross motions for summary judgment was held in Philadelphia, Pennsylvania on February 22, 2007. With the briefing and oral argument now complete, the issues raised by the parties are ripe for resolution. Accordingly, this Report is now filed with the Court.

ISSUES PRESENTED

The parties both agree that the central issues in this action revolve around the meaning of the 1905 Compact, and in particular, Article VII. The 1934 ruling of this Court in *New Jersey v. Delaware II* declared that Delaware's ownership of the River and its subaqueous soil up to the low water mark on the New Jersey side of the River

[75] Delaware's Proposed Form of Judgment, attached hereto as Appendix H. Like New Jersey's proposal, Delaware's proposed judgment contained additional elements regarding payment of the Special Master's expenses and the Court's retention of jurisdiction.

is subject to the Compact. Therefore, New Jersey's claim to riparian rights and exclusive jurisdiction over improvements appurtenant to that shore is dependent on the language of the Compact itself.

As defined by the arguments put forth by the parties on their summary judgment motions, the issues for the Court to decide are:

1. *The "Riparian Lands Issue."* Whether the Compact preserves for New Jersey the authority to make riparian land grants outshore of the low water mark on its side of the River within the twelve-mile circle.

2. *The "Riparian Rights Issue."* Whether the Compact preserves for New Jersey the authority to grant riparian rights outshore of the low water mark on its side of the River within the twelve-mile circle.

3. *The "Riparian Jurisdiction Issue."* Whether the Compact's preservation of "riparian jurisdiction" of "every kind and nature" authorizes New Jersey to exercise regulatory jurisdiction to the full extent of its police powers outshore of the low water mark on its side of the River within the twelve-mile circle, or instead is confined to a narrower scope of jurisdiction beyond New Jersey's sovereign territory. And, regardless of the scope of "riparian jurisdiction" preserved for New Jersey within the twelve-mile circle, whether that jurisdiction is exclusive of any claim of jurisdiction by Delaware.

4. *The "Estoppel Issue."* Whether, if the Compact does not explicitly preserve to New Jersey exclusive jurisdiction of every kind and

nature over riparian projects, such as the Crown Landing project, constructed on the New Jersey shore but extending outshore of the low water mark on the River within the twelve-mile circle, Delaware nonetheless should be judicially estopped from challenging New Jersey's claim of exclusive jurisdiction.

5. *The "Prescription Issue."* Whether, regardless of the meaning of the Compact, New Jersey, through the doctrine of prescription and acquiescence, has acquired the exclusive authority to grant riparian lands and rights and to exercise jurisdiction of every kind and nature related to projects, such as the Crown Landing project, constructed on the New Jersey shore but extending outshore of the low water mark on the River within the twelve-mile circle.

For convenience, the balance of this Report will refer to each of these issues by the shorthand titles used above.

For the reasons stated below, the Compact does preserve for New Jersey riparian rights and riparian jurisdiction, so that New Jersey may authorize the exercise of riparian rights, such as the construction of wharves associated with the Crown Landing project, appurtenant to its shore and extending beyond the low water mark. However, New Jersey's authority to make riparian land grants applies only inshore of the State boundary at the low water mark.

Furthermore, New Jersey's authority to exercise jurisdiction outshore of the low water mark is limited to jurisdiction over riparian rights, rather than complete regulatory jurisdiction under New Jersey's full police

powers. Moreover, the riparian jurisdiction preserved to New Jersey on its own side of the River outshore of the low water mark is not exclusive under the Compact; therefore Delaware also has overlapping jurisdiction to regulate, under its full police powers, improvements outshore of the low water mark on the New Jersey side of the River.

In addition, Delaware is not estopped from challenging New Jersey's claim of exclusive jurisdiction in this action. Finally, New Jersey's arguments that it has acquired exclusive jurisdiction through prescription and acquiescence are not persuasive.

Therefore, this Report recommends that the Court enter declaratory judgment consistent with the foregoing findings and otherwise deny the motions for summary judgment of both States.[76]

ANALYSIS

Resolution of the first three issues – the Riparian Lands Issue, the Riparian Rights Issue and the Riparian Jurisdiction Issue – depends upon the meaning of Article VII of the Compact. That interpretation must take into account the parties' contemporaneous understanding in

[76] The injunctive relief requested by the parties is unwarranted, because presumably each State will abide by the Court's ruling and entry of declaratory relief. *See, e.g., Texas v. Florida*, 306 U.S. 398, 411 (1939) ("While in most causes in equity the principal relief sought is that afforded by injunction, there are others in which the irreparable injury which is the indispensable basis for the exercise of equity powers is prevented by a mere adjudication of rights which is binding on the parties. This has long been the settled practice of this Court in cases of boundary disputes between states.").

1905 and the parties' course of conduct after ratification of the Compact. Therefore, the Report first considers what impact the Compact has on resolving those issues in the context of the pertinent documents and this Court's prior decision in *New Jersey v. Delaware II*. The Report then considers the evidence offered by the parties in support of their respective positions on the Estoppel and Prescription Issues raised by New Jersey.

I. The Riparian Lands and Riparian Rights Issues.

New Jersey's authority to grant[77] riparian *lands* necessarily is limited by the boundary set in *New Jersey v. Delaware II*. However, New Jersey retains authority to grant riparian *rights* appurtenant to its own shore under Article VII of the Compact, regardless of the location of the boundary. That authority was not eliminated by this Court's resolution of the boundary dispute in *New Jersey v. Delaware II*. The difference stems from the fact that a State's authority to make land grants ordinarily is limited to those lands for which it holds title. Nothing in the Compact changes that result. Riparian rights, on the other hand, commonly extend over, and may be exercised on, land not owned by the riparian owner. Thus, the fact that Delaware holds title to the River outshore of the low water mark does not impact New Jersey's ability as a riparian owner to construct riparian improvements, or to authorize

[77] Article VII provides that the States may make "grants, leases, and conveyances of riparian lands and rights." As shorthand, this Report refers to that authority collectively as the authority to "grant" riparian lands and rights, because the scope of the States' authority under Article VII does not appear to differ depending on which of those three methods is used to transfer riparian lands or rights.

others to construct such improvements, outshore of the low water mark to the navigable portions of the River.

A. Delaware's Ownership Up to the Low Water Mark on the New Jersey Side of the Delaware River.

The present action does not involve a dispute over the boundary between New Jersey and Delaware. This Court resolved the location of the boundary more than 70 years ago. "Within the twelve-mile circle, the river and the subaqueous soil thereof up to low water mark on the easterly or New Jersey side will be adjudged to belong to the state of Delaware, subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385. Thus, New Jersey cannot – and does not – dispute Delaware's ownership of the River up to the low water mark.

Because Delaware owns the land and water up to the low water mark, the starting presumption is that Delaware, as the sovereign State, has jurisdiction over its own land. As this Court has held, a sovereign State ordinarily has jurisdiction up to the limits of its own boundaries, but no farther. *See United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands – which carries with it power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty."); *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 622 (1899) (holding that Indiana could not tax the portion of a bridge structure beyond the boundary and situated on territory owned by Kentucky). "It follows, that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes

some cession." *Rhode Island v. Massachusetts*, 37 U.S. 657, 733 (1838).

Accordingly, absent any interstate agreement to the contrary, Delaware is entitled to the exclusive authority – as against a sister State – to regulate matters occurring within its territory. In this case, any limitation on Delaware's right to regulate or control matters occurring below the low water mark must be found in the Compact. Any limitation exists because the Court's resolution of the location of the common River boundary was expressly made "subject to the Compact of 1905." *See New Jersey v. Delaware II*, 291 U.S. at 385. The analysis therefore necessarily turns on what authority, if any, the Compact provides for New Jersey to exercise jurisdiction outshore of the low water mark of the River that could override the presumption in favor of Delaware's authority over such lands.

B. The Impact of the Boundary Resolution on the Authority of Each State Under the Compact.

Article VII of the Compact provides that "Each State may, *on its own side of the river*, continue[78] to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."[79]

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[78] Contemporaneously with the Compact's adoption, the verb "continue" was defined in part to mean to "protract or extend in duration; to persevere or persist in; to cease not." Webster's International Dictionary of the English Language at 314 (1898) (DA 4195).

[79] Compact Art. VII (emphasis added), App. B-5.

Delaware argues that the phrase "its own side of the river" should be read with reference to each State's boundary. In other words, Delaware argues that – because this Court, 29 years after the Compact, determined that Delaware owns the entire River up to the low water mark on the eastern shore – the entire River is on Delaware's "own side," and New Jersey consequently has no "side" of the River on which to exercise any riparian rights or riparian jurisdiction. To state that argument is to show its fallacies.

The interpretation of Article VII is a question of law. The Compact is both a contract and, upon ratification by Congress, the equivalent of a federal statute. Therefore, ordinary principles of contract and statutory construction govern its interpretation. *See Virginia v. Maryland*, 540 U.S. 56, 66 (2003) ("We interpret a congressionally approved interstate compact [j]ust as if [we] were addressing a federal statute.") (internal quotation marks omitted); *see also New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Under the rules of statutory construction, Delaware's position that New Jersey no longer has the authority to exercise riparian jurisdiction or make grants of riparian rights is unpersuasive for at least six reasons.

First, Delaware's construction of "its own side of the river" defies common sense. Even after *New Jersey v. Delaware II*, New Jersey still owns down to the easterly low water mark. *See New Jersey v. Delaware II*, 291 U.S. at 385. As this Court noted, in defining the boundaries, Delaware owns up to the "New Jersey side" of the River. So New Jersey still has a side. *Id.*

Second, nothing in the Compact makes New Jersey's ability to continue exercising whatever rights and jurisdiction

were confirmed in Article VII contingent on New Jersey's actual ownership of a portion of the River westerly of the boundary. Indeed, the historical evidence presented by the parties shows that New Jersey had maintained, from its formation as a State, that "as a result of the American Revolution, that portion of the Delaware River lying between the thalweg of the Delaware River and the high water mark on the easterly shore within the twelve-mile circle became and remained vested in fee simple in New Jersey."[80] New Jersey had a long history of making land grants along its shore, setting boundaries, adopting pierhead and bulkhead lines, and the like.[81] Had the States intended that the resolution of the boundary render Article VII void, they would have said so in clearer terms.

Third, Delaware's attempt to parse through the other Articles in the Compact to try to craft an argument that Article VII's reference to "own side of the river" was used by the drafters as a proxy to mean "only if each state owns to the middle of the river" is similarly unpersuasive. Delaware's comparison of Article VII with the other provisions of the Compact cannot change the fact that New Jersey continues to have a "side of the river" under any rational interpretation of that term.[82]

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[80] JSF ¶ 2.

[81] *See* Appendix I. In addition, Mr. Castagna has attached several maps to his affidavit and report showing the locations of wharves constructed on New Jersey's shore. *See* Castagna Aff. (NJA 369a); Report of Richard Castagna ("Castagna Rep.") (NJA 1193a); JSF ¶¶ 10, 15-16, 18-20, 32.

[82] Delaware also cites to the 1898 edition of Webster's Dictionary, that defines "side" to mean the "margin, edge, verge, or border of a surface . . . as, the side . . . of a river." (DA 4199). Again, New Jersey does retain not only an "edge" or "border" along the River even after

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Fourth, in filings in *New Jersey v. Delaware II*, Delaware characterized the States' boundary within the twelve-mile circle as the "low water mark on the New Jersey shore."[83] If New Jersey owns the "shore," surely it also has its own "side."

Fifth, relevant historical documents show that Delaware recognized that New Jersey continues to have certain authority under Article VII even after the resolution of the boundary dispute.[84]

Sixth, Delaware's construction of "its own side of the river" effectively would render Article VII meaningless. Delaware's assertion that Article VII contains an implied time limit, rendering it void upon this Court's establishment of the boundary in *New Jersey v. Delaware II*, is belied by the language of Article IX, *i.e.*, that the Compact is "binding in perpetuity upon both of said states."[85] Delaware's interpretation flies in the face of ordinary principles of statutory construction that preclude interpreting language in a manner

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New Jersey v. Delaware II, but also a portion of the River itself, between the low and high water marks. Thus, New Jersey has a "side" of the River according to the common definition set forth in the contemporary edition of Webster's, as well.

[83] Delaware's Reply Brief to this Court in *New Jersey v. Delaware II* at 17 (NJA 140a).

[84] *See* Letter from Clarence Southerland to Percy Warren Green, Delaware Attorney General, dated July 3, 1935 (stating that "the State of Delaware will be justified in contending that the compact does nothing more than recognize what had already been recognized by the State of Delaware, namely, *the right of owners of the upland on the New Jersey shore to wharf out to deep water, and that, in any event, the compact cannot be construed as doing more than ceding to New Jersey a certain limited amount of jurisdiction over riparian matters*") (emphasis added) (NJA 200a).

[85] Compact Art. IX, App. B-5.

that renders it devoid of meaning. *See, e.g., New York State Blue Cross Plans v. Travelers Ins.*, 514 U.S. 645, 667 (1995); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995).

Delaware points to a joint submission prepared by Delaware's counsel and submitted to this Court in *New Jersey v. Delaware I*. Delaware's counsel summarily stated that the Compact was "not a settlement of the disputed boundary, but a truce or *modus vivendi*."[86] Delaware thus attempted to show that the States' rights under Article VII were entirely temporary and contingent on the ultimate resolution of the boundary. That position is inconsistent with Delaware's representations to the Court in *New Jersey v. Delaware II* on the continuing vitality of the Compact. Moreover, it is clear from the joint submission in *New Jersey v. Delaware I* that Delaware's counsel was referring to the Compact as a "truce or *modus vivendi*" only in connection with the still unresolved boundary dispute that obviously had not been addressed in the Compact, rather than as a representation that the entire Compact was intended merely as a temporary measure.[87]

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[86] Statement of Reasons Submitted Orally for the Joint Application of Counsel on Both Sides for Suspension of Proceedings Until the Further Order of the Court in *New Jersey v. Delaware I* (DA 190).

[87] Delaware's own expert witness on riparian law, Joseph L. Sax, appears to distance himself from Delaware's interpretation of "own side of the river." Although Mr. Sax opines on the likely meaning of "riparian rights" and "riparian jurisdiction" set forth in Article VII, he conspicuously declines to offer any opinion on "the meaning of the Article VII phrase 'own side of the river.'" Report of Joseph L. Sax ("Sax Report") at 7 n.14 (DA 4129). At the very least Delaware's proffered riparian expert provides no support for Delaware's strained interpretation.

New Jersey has objected to the admissibility of the Sax Report. There is no need to address that objection because his opinions would not materially affect the conclusions here reached.

New Jersey continues to have "its own side of the river." The focus then turns to what authority New Jersey retains under the Compact to make grants of riparian lands and rights, and to exercise riparian jurisdiction, on that side of the River.

C. Riparian Lands: New Jersey's Authority to Make Grants, Leases, and Conveyances of Riparian Lands on the Eastern Side of the River.

Article VII reserves to both States the right to "make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."[88] This Report first addresses the authority New Jersey possesses over riparian *lands*, leaving discussion of its authority in regard to riparian *rights* to the following Section D.

The term "riparian land" typically is defined to mean "a tract of land that borders on a watercourse or lake, whether or not it includes a part of the bed of the watercourse or lake." Restatement (Second) of Torts § 843.[89] Land need not actually be covered by the waters of a river to be considered riparian, as long as it touches upon or is adjacent to the water. *See* 1 Henry P. Farnham, Water and

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[88] Compact Art. VII, App. B-5.

[89] *See also* Restatement (Second) of Torts § 843, cmt. e ("Riparian land may include all or part of the bed or may only border upon the water if the bed is owned by another person or the public."). Contemporaneously with the adoption of the Compact in 1905, the term "riparian" was defined to mean, "Of or pertaining to the bank of a river." Webster's Int'l Dictionary of the English Language (1898) (NJA 1318a). That definition is consistent with the definition contained in the more recent Restatement.

Water Rights § 63 at 281 (1904) (hereinafter "Farnham") ("The rights attached to riparian ownership are not affected by the character of the water and depend upon lateral contact with the water, and not upon ownership of the soil under water.").[90]

Thus, the "riparian lands" that New Jersey may grant encompass the banks and lands adjacent to the River, as well as any land underneath the River, to the extent New Jersey owns such land. Indeed, New Jersey would, even without the Compact, remain as the sovereign owner of that land down to the low water mark.

The question remains whether the Compact continues to bestow upon New Jersey the authority to make grants of riparian lands outshore of the low water mark. New Jersey has not advanced any convincing argument that the drafters of the Compact intended by Article VII to permit one State to make grants of riparian land actually owned by the other State. In historical documents, New Jersey has conceded that the Compact "gave the State of New Jersey no proprietary rights in the soil within the twelve-mile circle," and "New Jersey has no ownership in the soil offshore of said low-water mark."[91] Similarly, New Jersey previously has recognized that the "lands below low

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[90] *See also City of Paterson v. East Jersey Water Co.*, 70 A. 472, 479 (N.J. Ch. 1908) ("Riparian lands, in the language of the cases and treatises, include by nature as well the lands over as those along which the stream flows, and riparian rights are incident to lands on the bank, as well as those forming the bed of the stream."); 2 Farnham § 463a at 1572 ("The most satisfactory rule is that the parcels of land should be regarded as riparian so far as their location with reference to the stream has indicated where their boundary should be fixed. . . .").

[91] New Jersey Attorney General, Formal Opinion No. 22, dated Nov. 16, 1956, at 116, 122 (NJA 308a).

water mark within the twelve-mile Circle are not the lands of this State, but lands of the State of Delaware," and therefore that New Jersey was not authorized to issue licenses and collect fees for "the dredging of bottom material below low water mark."[92] Those views follow naturally from the fact that the boundary between the States is set at the low water mark, so Delaware owns title to the soil westerly of the low water mark on the New Jersey shore.

As the sovereign holding title outshore of the low water mark, Delaware, not New Jersey, has the right to make any "grants, leases and conveyances" of such land. Typically, inquiry into the scope of an intrusion on the "'title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *United States v. Alaska*, 521 U.S. at 34 (quoting *Montana*

[92] New Jersey Attorney General, Formal Opinion No. 3, dated Feb. 2, 1954, at 8 (NJA 302a). In the same opinion, the Attorney General concluded that – despite the fact that it did not permit New Jersey to dredge lands beyond the low water mark – the Compact should be read to permit New Jersey to make riparian grants of land outshore of the low water mark. In other words, the Attorney General concluded that the Compact should be read to permit New Jersey to make conveyances of the same Delaware land that New Jersey admittedly could not dredge. He did not explain the logic of one State conveying property titled in another State. In any event, those two conclusions appear to be fundamentally inconsistent with one another. One would assume that, if New Jersey were permitted to convey land owned by Delaware to private parties, and thus divest Delaware of its title in those lands, it likewise could permit those private parties to dredge soil on the land it conveyed to them. Moreover, the latter conclusion was based in part on the practical view that, if a riparian owner had to obtain grants from both States, such owner would have to undergo a "cumbersome procedure." *Id.* Cumbersome though it might be, as discussed below, that alone does not warrant reading Article VII in such a way that it deprives Delaware of its sovereign rights, any more than the Court should adopt Delaware's interpretation of Article VII that effectively would deprive New Jersey of all its rights.

v. United States, 450 U.S. 544, 552 (1981)). Likewise, "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *see Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *United States v. Texas*, 162 U.S. 1, 68 (1896).

Consistent with those canons, Article VIII in the Compact provides, "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."[93] Thus, any waiver of Delaware's sovereign claim to title in lands outshore of the low water mark must be express. Although Article VII permits New Jersey to continue making grants of riparian lands on "its own side of the river," that provision does not expressly state that the States intended that New Jersey could make grants of land owned by another sovereign State. On the contrary, Article VII just as easily can be read to mean that New Jersey continues to have the power to make grants of the foreshore that it continues to own, *i.e.*, the area between the high and low water marks on the eastern shore of the River. Historically, New Jersey had done so by virtue of its ownership of the foreshore, in contrast to the law in Delaware that recognized title in riparian land owners down to the low water mark on its shore. In any event, Article VII does not expressly state that Delaware was waiving any claim to title in lands. And by the direction of Article VIII, because New Jersey's interpretation is not

[93] Compact Art. VIII, App. B-5.

supported by express language in Article VII, it should be rejected.

The States entered into the Compact in the face of their then-unresolved boundary dispute. As of 1905, New Jersey claimed title to the middle of the channel, and Delaware claimed title up to the low water mark. The Compact did not address that boundary question. Rather, it left it to be resolved another day. In the context of that setting, it is improbable that Delaware would have implicitly agreed to waive or cede any potential property rights it might have in the water and subaqueous soil between the shipping channel and the low water mark, once the boundary was eventually settled, without using explicit language to that effect. In addition, New Jersey would have insisted upon express language bestowing upon it the authority to make riparian land grants regardless of where the boundary was to be located, to avoid the precise type of dispute in which the States are today embroiled.

Finally, if Article VII of the Compact resulted in a waiver by Delaware of any authority to exercise and enforce its property rights on and under the River up to the low water mark, this Court would have resolved *New Jersey v. Delaware II* differently. In advancing its argument that it held title up to the middle of the shipping channel, New Jersey argued that "by this compact the controversy was set to rest and the claim of Delaware abandoned." *New Jersey v. Delaware II*, 291 U.S. at 377. This Court concluded that New Jersey's argument was "wholly without force," at least in part because of the language in Article VIII disclaiming any intent to affect the territorial rights or jurisdiction of either State in the River or subaqueous soil. *Id.* at 377-78. This Court thus rejected the argument New Jersey makes now, *i.e.*, that

the Compact somehow bestowed property rights on New Jersey beyond the low water mark. Had the Court accepted New Jersey's argument that Delaware had waived or abandoned its claim of sovereignty to the low water mark on the New Jersey shore, the boundary would not be where it is today.

New Jersey does not dispute Delaware's ownership of the land up to the low water mark. Yet, under New Jersey's theory, New Jersey could continually grant away from Delaware title to the lands on the eastern half of the River all the way up to the middle of the shipping channel, effectively overriding – with no compensation – this Court's careful determination of the location of the boundary at the low water mark. At oral argument, New Jersey asserted that it has the authority to grant title to subaqueous lands west of the low water mark simply because this Court's 1935 Decree made the location of the boundary "subject to the Compact of 1905" assumes that this Court implicitly gave New Jersey the right to transfer title to lands that the Court had just concluded belonged to Delaware. Had this Court intended such a result, it would have stated New Jersey's power in express terms, rather than by allusion.

The language of Article VII, when viewed in connection with Article VIII and in the context of the ongoing boundary dispute that still existed long after adoption of the Compact, does not amount to an express, advance waiver by Delaware of the sovereign rights over the water and soil up to the low water mark that this Court in *New Jersey v. Delaware II* ultimately found it to possess. Therefore, the fact that New Jersey owns only to the low water mark on its side of the River limits the extent of its authority to grant any "riparian lands." Now that the

border has been set at the low water mark of the River on its shore, New Jersey may continue to grant any lands on the banks of the River down to the low water mark; but any lands underneath the River westerly of the low water mark belong to Delaware and are outside the scope of New Jersey's authority under Article VII to make "grants, leases or conveyances" of riparian lands.

D. Riparian Rights: New Jersey's Authority to Make Grants, Leases, and Conveyances of Riparian Rights on the Eastern Side of the River.

The conclusion that New Jersey may not make land grants outshore of the low water mark because they belong to Delaware does not end the inquiry. Article VII also provides that the each State may on "its own side of the river" grant "riparian rights," as well as riparian lands. The question then becomes what the term "riparian rights" means in the context of the Compact.

Both States agree that riparian owners traditionally have had authority to exercise and grant riparian rights, including the right to construct wharves and other improvements extending into an adjacent river, even where they do not own the river itself.[31] Delaware's argument that New Jersey effectively lost the right to construct wharves extending outshore of the low water mark because New Jersey no longer has "its own side" of the River is, for the reasons set forth above, without merit. Both states thus still possess that authority. The scope of that

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[31] *See* New Jersey's Brief in Support of Motion for Summary Judgment at 27; Delaware's Motion for Summary Judgment at 52-54.

authority – at least on New Jersey's part – must still be explored.

The scope of "riparian rights" preserved to each State in Article VII is informed by the contemporaneous understanding of "riparian rights" at the time the Compact was ratified. And that contemporaneous understanding of "riparian rights," in turn, will shed light on the intended meaning of the separate preservation of "riparian jurisdiction" also contained in Article VII.

The concept of riparian rights was well established by 1905. As one contemporary leading treatise noted:

> A comprehensive statement of the rights of a riparian owner is that he has a right to have the stream remain in place and flow as nature directs, and to make such use of the flowing water as he can make without materially interfering with the equal rights of the owners above and below him on the stream.

2 Farnham, Water and Water Rights § 461 at 1565 (1904) (hereinafter "Farnham"). A party's riparian rights include a right of access to the water, typically through construction of wharves. "The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream." 1 Farnham § 62 at 279.[95] This Court recognized that common understanding of riparian rights in *New Jersey v. Delaware II*.

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[95] "A wharf is a structure on the margin of navigable water, alongside of which vessels are brought for the sake of being conveniently loaded or unloaded." 1 Farnham § 111 at 520.

> The acts of dominion by riparian proprietors are connected with the building of wharves and piers that project into the stream. . . . By the law of waters of many of our states, a law which in that respect has departed from the common law of England, riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the state.

New Jersey v. Delaware II, 291 U.S. at 375; *see also United States v. River Rouge Improvement Co.*, 269 U.S. 411, 418 (1926) (finding it "well settled" that a riparian owner generally "has, in addition to the rights common to the public a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose") (internal citation omitted). As this Court stated roughly fifty years before the States entered into the 1905 Compact:

> Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, and arms of the sea, as well as on the lakes. . . . Wharves, quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time.

Dutton v. Strong, 66 U.S. 23, 31-32 (1861). Thus, a riparian owner's right to "wharf out" into an adjacent stream, even where the bed of the river is owned by the State, was long recognized before 1905 and must have been within the contemplation of the drafters of the Compact, many of whom were themselves lawyers.[96]

The fact that New Jersey retains its riparian rights, including the right to construct wharves and other improvements beyond the low water mark, does not mean that its riparian rights are without limitation. Although a riparian landowner has the right to construct a wharf or other improvement to access navigable waters, that right is not absolute. Rather, riparian owners have a right to reasonable access to and use of the adjacent water, subject to appropriate regulation.[97] By the time of the 1905 Compact, this Court had recognized that a riparian owner's exercise of riparian rights was subject to reasonable regulation by the State. *See, e.g., Cummings v. City of Chicago*, 188 U.S. 410, 427 (1903) (upholding municipality's right to regulate construction of improvements on the Calumet river); *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 21 (1885) (addressing a statute governing the construction of dams and mills on waterways and the impact on adjoining riparian landowners and holding that it "is within the constitutional power of the legislature" to regulate such

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[96] Delaware's riparian law expert, Mr. Sax, likewise acknowledges "wharfing out" as a common riparian right, describing it as allowing "the riparian landowner to build a structure in the adjacent bottomlands sufficiently far out into the water to allow a ship to navigate to it, so it could load and unload, and its cargo could be transported on the wharf to the shore." Sax Report at 5 (DA 4127).

[97] *Cf.* 2 Farnham § 466 at 1578-79 (defining a riparian owner's "reasonable use" of waters).

riparian property rights). Similarly, Farnham noted in his 1904 treatise that riparian rights "are always subordinate to the public rights, and the state may regulate their exercise in the interest of the public." 1 Farnham § 63 at 284; *see also* 1 Farnham § 113 at 528; *see* 3 Farnham § 873 at 2540.

Historically, the riparian right to construct wharves was limited always by the greater public need to ensure safe and unhindered navigation along the waterway. *See, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. at 419. The right to wharf out similarly is restricted where the construction or operation of the wharf amounts to a public nuisance, although the nuisance analysis also often turns on whether a wharf poses an obstacle to a river's navigability. *See, e.g., Dutton*, 66 U.S. at 31. Particularly in situations where title to the riverbed lies with an entity other than the riparian owner, "the separate ownership may affect the exercise of some riparian rights by the owner of the adjoining upland." Restatement (Second) of Torts § 843 cmt. e.[38]

In light of those well-established principles, both States agree that riparian rights, such as the right to

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[38] Courts in numerous jurisdictions have reached similar conclusions about the limitations on riparian rights. *See, e.g., State v. Knowles-Lombard Co.*, 122 Conn. 263, 188 A. 275, 276 (Conn. 1936); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909); *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 151 (Mich. 1960); *State v. Korrer*, 148 N.W. 617, 622 (Minn. 1914); *Trustees, etc., of Town of Brookhaven v. Smith*, 80 N.E. 665, 670 (N.Y. 1907). *Cf. Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511, 1866 WL 89, at *5 (Ct. Errors & Appeals 1866) ("Extraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law" to the riparian right to wharf out.).

wharf out, are subject to state regulation.[99] Although there is no bright-line rule for what scope of regulation may be permitted – nor does the present dispute between New Jersey and Delaware require resolution of such a question – the point remains that riparian rights, like other rights, are subject to regulation by the State under its police powers.[100]

Therefore, New Jersey's preserved authority under Article VII of the Compact to make grants of "riparian rights," including the right to build wharves or to authorize private landowners on its shores to do the same, is subject to reasonable regulation by the State. The question remains which State is, or which States are, entitled to exercise that oversight on the eastern side of the River. That issue is addressed in Section II below.

Conclusion: The Riparian Lands Issue and the Riparian Rights Issue

The Compact preserves for New Jersey the authority to make grants of riparian *lands* down only to the low water mark on the New Jersey shore. But the Compact preserves for New Jersey the authority to make grants of

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[99] *See* New Jersey's Brief in Support of Motion for Summary Judgment at 29-31; Delaware's Motion for Summary Judgment at 55-56.

[100] "The police power of a state, while not susceptible of definition with circumstantial precision, . . . springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. . . . It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." *Panhandle Eastern P. Line Co. v. State Highway Comm'n*, 294 U.S. 613, 622 (1935); *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.").

riparian *rights* outshore of the low water mark under New Jersey's law of riparian rights, including the right to construct wharves and other improvements extending to navigable waters flowing over subaqueous soil owned by Delaware. Finally, the parties did not intend that each State's authority "on its own side of the river" in Article VII be eliminated entirely once the location of the boundary was resolved by this Court in 1934. Rather, although the location of the boundary impacts the extent of each State's authority under Article VII, both States continue to have certain authority thereunder. I therefore conclude that:

> **New Jersey has the authority to make grants, leases, and conveyances of riparian lands on the New Jersey side of the Delaware River within the twelve-mile circle only down to the low water mark.**
>
> **Consistent with New Jersey's law of riparian rights, New Jersey riparian owners may construct, maintain and use improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.**

II. The Riparian Jurisdiction Issue.

Within the twelve-mile circle, one sovereign – New Jersey – owns down to the eastern low water mark, and a second sovereign – Delaware – owns from that low water mark all the way across to its own opposite shore. Thus, this situation is unusual in that the two States do not own equal shares of the River forming their common boundary.

Both States agree that *a* State has the authority to regulate riparian improvements extending outward from New Jersey's shore. The only question is *which* State has, or which States have, the authority to do so. For the reasons discussed above, Delaware's contention that it has exclusive jurisdiction to regulate any riparian improvements along New Jersey's shore because New Jersey no longer has "its own side of the river" is unpersuasive. Thus, Article VII's preservation of "riparian jurisdiction" must either give New Jersey exclusive jurisdiction to regulate all aspects of riparian improvements on its shore, or it must recognize overlapping jurisdiction by both States to the extent riparian development straddles the boundary. As set forth below, New Jersey's assertion that it has exclusive jurisdiction to regulate any riparian improvements on the eastern shore of the Delaware River so far as they extend outshore of the low water mark is equally unpersuasive. Thus, analysis compels the conclusion that there is overlapping jurisdiction on the eastern shore of the Delaware River so far as riparian improvements extend outshore of the low water mark onto Delaware's lands.

A. Construing "Riparian Jurisdiction of Every Kind and Nature" in the Context of the Compact as a Whole and Extrinsic Circumstances.

Article VII provides in pertinent part: "Each State may . . . continue to exercise *riparian jurisdiction of every kind and nature.*"[101] New Jersey asserts that the grant of "riparian jurisdiction" should be read broadly to mean that

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[101] Compact Art. VII (emphasis added), App. B-5.

it may exercise full regulatory authority over any riparian improvements on the eastern side of the River to the outer limits of its police powers, regardless of the location of the boundary. Generally speaking, a State may exercise its police powers for "the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." *Northwestern Fertilizing Co. v. Village of Hyde Park*, 97 U.S. 659, 667 (1878) (internal quotation marks omitted). New Jersey argues that "riparian jurisdiction" is a surrogate for full police power jurisdiction, and that if New Jersey is entitled to exercise full police powers on improvements extending from its shore, Delaware necessarily cannot do the same.

1. The Scope of New Jersey's Riparian Jursidiction.

The Compact does not define what the drafters intended by the term "riparian jurisdiction." Nor have the States pointed to any contemporaneous writings, caselaw or other authority that discuss the concept of "riparian jurisdiction" in any substantive way. It appears to be a concept that was devised by the drafters specifically for Article VII of the Compact.[102] As such, the term is inherently ambiguous.

When construing ambiguous provisions of an interstate compact, it is appropriate to consider extrinsic evidence that helps shed light on the drafters' intentions. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("we repeatedly have looked to legislative history and

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[102] *See* Sax Report at 3 (DA 4281) ("The phrase 'riparian jurisdiction' was not then, and is not now, a legal term of art. It is, to the best of my knowledge, found neither in the treatise or article literature, nor in judicial opinions or statutes.").

other extrinsic material when required to interpret a statute which is ambiguous"). And in considering extrinsic evidence in such context, it is appropriate to "look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy." *Rhode Island v. Massachusetts*, 37 U.S. at 723 (internal citation omitted). *Cf. New Jersey v. New York*, 523 U.S. at 813 (Breyer, J., concurring) (noting that, although silence does not create ambiguity, "silence means that ordinary background law applies"). Thus, the context in which the States drafted the Compact is relevant.

It is also necessary to analyze Article VII in the context of the rest of the Compact. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2620 (2005) ("we must examine the statute's text in light of context, structure, and related statutory provisions"); *see also United States Nat. Bank v. Ind. Ins. Agents of Am.*, 508 U.S. 439, 454 (1993). It is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

There is no indication in the Compact, in existing caselaw or elsewhere as to what the term "riparian jurisdiction" might mean. But certainly the concept of "riparian rights" was, as discussed above, well known by the States at the time of the Compact. The grant of "riparian jurisdiction" must be construed against that backdrop of riparian rights understood by the parties to the Compact in 1905. As then understood, riparian rights related primarily to the right of access to navigable waters and the right to use waters appurtenant to riparian property. But that right of

access did not automatically permit a riparian landowner to use that access to engage in any activity whatsoever, free from regulation or oversight by the State. Instead, riparian rights, including the right to build a wharf, remained subject to regulation under a State's police powers regarding the types of activities for which the wharf could be used. Thus, historically, the authority to exercise riparian rights has been viewed as separate from – and subservient to – a State's general regulatory law. In light of Article VII's preservation of only "riparian" jurisdiction to each State, the parties must have intended that the jurisdiction preserved to each State relate only to oversight of riparian rights and the exercise of such rights, and not a grant of general police powers to be exercised by one State within the territory of the other.

Because the drafters placed the reservation of "riparian jurisdiction" in the same Article – indeed in the same sentence – that reserved to the States the power to grant "riparian rights," it is reasonable to assume that the parties intended the recognition of continuing "riparian jurisdiction" to relate in some way to the similar power to grant "riparian rights." The language of Article VII thus suggests that each State retained the ability to grant riparian rights and exercise jurisdiction over riparian rights on its own shores, regardless of where the boundary might later be located. That is consistent with the language in Article VII that allowed each State to "continue" exercising "riparian jurisdiction."[103] The parties thus must have intended that New Jersey law continue to govern the scope of riparian rights along New Jersey's shore, as it had in practice done for decades, and that Delaware law

[103] Compact Art. VII, App. B-5.

continue to govern the scope of riparian rights along Delaware's shore.

The drafters might have included that language out of a concern on the part of New Jersey that, if the boundary eventually were found to rest at the low water mark, the exercise of riparian rights, such as the right to wharf out, could become subject to Delaware's law, rather than New Jersey's. *See, e.g., Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 355 (1909) (stating that ordinarily the "rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated"). As discussed above, at the time of the Compact, the two States treated riparian rights and ownership of riparian lands differently. By including the authority to exercise "riparian jurisdiction" as well as to make grants of riparian rights, the States ensured that each State would be able to apply its own laws, *i.e.*, to exercise its own jurisdiction, in determining the standards to be met in making riparian grants and otherwise regulating riparian rights, such as the right to wharf out.

In any event, "riparian" is a limiting modifier. The phrase "riparian jurisdiction" fairly can be read only to mean the authority of each State, on its own side of the River, to establish and oversee the riparian rights associated with land appurtenant to the River, under its own laws. It cannot be construed as confirmation of broader police powers to regulate all activities that might be conducted on riparian improvements even to the extent those improvements cross the boundary line. The preservation of riparian jurisdiction logically should be confined to the power of each State on its own side of the River to determine the extent of riparian rights, as, for example, by

defining how far a riparian owner can wharf out, the quantities of water that a riparian owner can draw from the River, and the like. While an exercise of riparian jurisdiction under those parameters necessarily would include a limited exercise of police powers, it is not a general authorization for the exercise of full police powers to regulate matters beyond each State's law of riparian rights.

That understanding is consistent with the language used by New Jersey in its various grants of riparian lands. It, in the exercise of its riparian jurisdiction to define the outer limits of a riparian owner's riparian rights, typically set boundaries for wharfing out and other riparian construction. It has not purported to define what the riparian owner could or could not do with the wharf. Of course, above the low water mark, New Jersey, as sovereign, retains its full police powers. Presumably for any riparian improvement, such as a wharf, that begins on the New Jersey shore and extends outshore of the low water mark, New Jersey, under its police powers, may continue to exercise full regulatory authority down to the boundary line at low water. As a practical matter, New Jersey effectively could limit what takes place outshore of the low water mark by exercising regulatory control over wharves above the low water mark. It could, for example, exercise that control by regulating access to and from the wharf above the low water mark. Nevertheless, outshore of the low water mark, Article VII entitles New Jersey to exercise only "riparian" jurisdiction, which is a subset of the total bundle of police powers.

Historical evidence also supports Delaware's position that the parties used the phrase "riparian jurisdiction of every kind and nature" as a reflection of each State's

interest in assuring that it would be able to continue regulating riparian rights according to its own laws in all respects.

In 1867 New Jersey's then Attorney General, George M. Robeson, issued a detailed opinion on the scope of riparian rights and the State's regulation of those rights.[104] He chronicled the common law origins of New Jersey's law of riparian rights. As he explained it, riparian rights under New Jersey law focus on the riparian owner's access to navigable waters. They are "confined to uses naturally incidental to the right to occupy the shore, such as the right of passage and landing, of egress and ingress to and from, and the general use of the docks and wharves which the 'riparian owner' may have constructed."[105] Robeson also recognized that in New Jersey riparian rights were not absolute, but rather were subject to varying degrees of regulation by the State. The State retained the power to regulate – or even eliminate – riparian rights for "public uses."[106] According to Robeson, New Jersey law recognized "two great classes" of "public uses" for which the State could restrict riparian rights:

> the one comprising the essential interests of governmental strength and public safety, upon which the government itself acts directly; and the other, those objects, which more remotely affecting the public welfare, are usually committed

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[104] Opinion Concerning Riparian Rights by Hon. George M. Robeson, Attorney General of New Jersey, to the New Jersey Senate, dated Mar. 15, 1867 (DA 905-11).

[105] *Id.* at 9 (DA 909).

[106] *Id.* at 10 (DA 910).

> to the conduct of private enterprise, under the regulating supervision of the government.[107]

Riparian rights in New Jersey are "in their very nature themselves subject to that class of 'public uses' which have been spoken of as the peculiar objects of direct governmental action," including "navigation and the great public uses for defence and public safety, (fortifications, arsenals, break-water and light-houses, are examples of this class of 'public uses')."[108] Thus, New Jersey landowners' riparian rights to access navigable waters over the foreshore owned by the State "are held, subject, as a condition of their existence, to the use of the public domain for the governmental purposes of defence and public safety; and the use of this domain for such purposes would be in no sense a 'taking' of them" requiring compensation.[109]

In contrast to those "great public uses," under New Jersey law the State also retained the authority to regulate or take riparian rights "for other 'public purposes,' upon compensation rendered, (turnpikes, railroads, canals, ferries, public basins, docks and wharves, are examples of these other 'public uses')."[110] In those contexts, where the State desires to eliminate a landowner's riparian rights, "the 'riparian rights' may be taken and extinguished by the exercise of the right of eminent domain, upon compensation rendered."[111]

Thus, in New Jersey, the State exercised jurisdiction over riparian rights in a variety of ways, depending on the particular uses involved and an assessment of whether

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[107] *Id.*

[108] *Id.* at 11-12 (DA 910-11).

[109] *Id.*

[110] *Id.* at 12 (DA 911).

[111] *Id.* at 12-13 (DA 911).

they constituted mere "public uses" or "great public uses." By preserving to each State the authority to continue exercising "riparian" jurisdiction of every kind and nature, the drafters of the Compact intended to ensure that each State would be free to continue exercising jurisdiction over riparian rights according to its own laws. That language preserved New Jersey's ability to regulate, or even eliminate, riparian rights according to its own laws. But that authority nevertheless was limited to jurisdiction over riparian rights, and not a broad exercise of police powers.

New Jersey's commissioners involved in drafting the Compact included two lawyers who served as New Jersey's Attorneys General in the period during which the Compact was negotiated. They would have been familiar with their predecessor's specifically detailed opinion on riparian rights and jurisdiction. That understanding of New Jersey's various ways of regulating riparian rights likely influenced the drafters' use of the phrase "riparian jurisdiction of every kind and nature" in Article VII. The parties intended that Article VII preserve for New Jersey the right to regulate riparian improvements appurtenant to its shore, *i.e.*, to exercise "riparian jurisdiction" over such improvements, to the same extent that its authority to make grants of riparian rights was preserved.

2. New Jersey's Claim of Exclusive Riparian Jursidiction.

a. The 1905 Compact

New Jersey also contends that the preservation of its ability to exercise riparian jurisdiction "of every kind and nature" gives it the *exclusive* right to exercise such

jurisdiction.[112] That contention is contrary to the plain language of the Compact. It would require the Court to read "riparian jurisdiction of every kind and nature" to mean "exclusive jurisdiction of every kind and nature" – a far broader concept than the language agreed upon by the drafters. Whatever the scope of "riparian jurisdiction" reserved to each State in Article VII, there is nothing in the language of the Compact suggesting that such jurisdiction would be exclusive for improvements straddling the boundary line. On the contrary, when viewed through the lens of the remainder of the Compact, it appears that the States consciously chose not to make the jurisdictional reservation in Article VII exclusive.

In other provisions of the Compact, the States expressly agreed to make jurisdiction exclusive in one State or the other. In Article IV, the parties provided, "Each State shall have and exercise *exclusive jurisdiction within said river* to arrest, try, and punish its own inhabitants for violation of the concurrent legislation relating to fishery herein provided for."[113] The parties also mentioned "exclusive jurisdiction" in Articles I and II, discussing the right to serve criminal process related to offenses committed "on board of any vessel being under the exclusive jurisdiction of that State."[114] Thus, the drafters were aware of the concept of "exclusive jurisdiction" and included it in other portions of the Compact when defining the States' respective rights.

Yet in Article VII, the States agreed only that each State could "exercise riparian jurisdiction of every kind and nature," without specifying that such jurisdiction

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[112] *See* Transcript of Oral Argument held on Feb. 22, 2007, at 15-17.

[113] Compact Art. IV (emphasis added), App. B-5.

[114] Compact Arts. I and II, App. B-2, B-3.

could be exercised only by that State.[115] The parties' decision to omit the word "exclusive" in Article VII while including it elsewhere in the Compact had to be intended to have significance and could not have been an inadvertent omission. New Jersey argues that, by comprehensively preserving to New Jersey riparian jurisdiction of "every kind and nature," the drafters intended that that reservation be exclusive – without actually saying so. According to New Jersey, if it retains "every" kind of jurisdiction, "no jurisdiction is left for the other" State.[116] That is not what Article VII says. First, Article VII preserves only the right to exercise *riparian* jurisdiction of every kind. That reference to riparian jurisdiction must be read to mean something more limited than every kind of jurisdiction. Second, the fact that Article VII allows New Jersey to continue exercising every kind of riparian jurisdiction does not mean that Delaware is not also entitled to exercise jurisdiction to the extent projects straddle the common border. Article VII cannot be read to mean that New Jersey's right to continue exercising riparian jurisdiction of every kind equates with *exclusive* jurisdiction where the drafters plainly did not say so.

New Jersey's position that Delaware essentially agreed to cede all jurisdiction over lands adjacent to New Jersey's shore, while Delaware still adamantly asserted title to those lands even after adoption of the 1905 Compact, is implausible. As New Jersey itself points out, the "Commissioners who negotiated the Compact of 1905 did not know where the boundary between the states would

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[115] Compact Art. VII, App. B-5.

[116] New Jersey's Opposition to Delaware's Motion for Summary Judgment at 37.

ultimately be set."[117] Delaware would not have willingly ceded all jurisdiction over matters taking place on land that it still contended it owned exclusively and outright. *Cf. Virginia v. Maryland*, 540 U.S. 56, 69 (2003) ("we read the 1785 Compact in light of the ongoing dispute over sovereignty").[118]

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[117] New Jersey's Opposition to Delaware's Motion for Summary Judgment at 32.

[118] Both parties point to *Virginia v. Maryland* as support for their arguments. In *Virginia v. Maryland*, the Court held that, under the terms of a 1785 compact and an 1877 arbitration award, Virginia was authorized to construct a water intake structure extending into the Potomac River, even though Virginia's boundary ended at the low water mark on its own side of that river. Superficially, that holding would appear to support New Jersey's argument here, *i.e.*, that construction of wharves off New Jersey's shore should not be subject to regulation by Delaware. But the Court's decision in *Virginia v. Maryland* followed from the unique language of the compact and arbitration award involved in that case. In that case, the 1785 compact specifically provided that the "citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river." 540 U.S. at 62. The subsequent arbitration award likewise provided that

> Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

Id. at 62-63.

Maryland previously had agreed that the effect of those provisions essentially was to incorporate any riparian improvements on the Virginia shore into Virginia's sovereign territory. For instance, in proceedings before the arbitrator, Maryland suggested *not* drawing the boundary at the low water mark on Virginia's shore, but rather "contended that the 'true' boundary line should be drawn around 'all

(Continued on following page)

b. The New Jersey-New York Compact of 1834.

The conclusion that the parties did not intend the reservation of "riparian" jurisdiction to equate to "exclusive" jurisdiction is further supported by a comparison of the language in the Compact to the language used in comparable provisions in the interstate compact entered into in 1834 between New Jersey and New York. That compact, among other things, established those States' rights and jurisdiction over common riparian boundaries. In the 1834 compact, the two States established their common boundary along the Hudson River. In one area it was set at "the low water-mark on the westerly or New Jersey side thereof," similar to the boundary between New Jersey and Delaware.[119] But in discussing New Jersey's retained jurisdiction over riparian improvements along its entire shore, including the portion which the States agreed New York owned up to the low water mark, the States provided:

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wharves and other improvements now extending or which may hereafter be extended, by authority of Virginia from the Virginia shore into the [Potomac] beyond low water mark.'" *Id.* at 72 n.7. The Court concluded that, although that express language was not used, the intention of the arbitrators in issuing their award was to achieve the same end – Virginia's authority to construct riparian improvements outshore of the low water mark without regulation by Maryland. The language of Article VII in the Compact of 1905 between New Jersey and Delaware contains no comparably clear language providing that the preservation of riparian jurisdiction for New Jersey was intended either to encompass all regulatory oversight (as opposed to merely riparian oversight) or to be exclusive of jurisdiction by Delaware.

[119] Compact between the State of New Jersey and the State of New York, Art. Third, 4 Stat. 708 (1834) (DA 887).

> 1. The state of New Jersey shall have *the exclusive right of property* in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.
>
> 2. The state of New Jersey shall have *the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state*: and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.[120]

Separate provisions granted New York comparable exclusive jurisdiction and rights over the area adjacent to Staten Island.[121] In other words, despite the fact that the boundary between New York and New Jersey was partially set at the western low water mark on New Jersey's shore, those two States expressly provided that New Jersey would retain exclusive jurisdiction over riparian improvements and vessels along the New Jersey shore. Comparable language is noticeably absent in the Compact.

There is some indication that the drafters of the Compact of 1905 were aware of the New Jersey-New York compact. Several provisions in the two interstate compacts bear strikingly similar language, suggesting at the very least that the drafters of the 1905 Compact might have

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[120] *Id.* (emphasis added)

[121] *Id.* Art. Fifth (DA 887).

drawn from the earlier compact between New Jersey and New York.[122] And, in any event, New Jersey, as a party to the prior compact with New York, cannot disclaim awareness of its own earlier interstate agreement. Nor can New Jersey credibly argue that it was unaware that Article VII could have been drafted in a manner that clearly granted it exclusive jurisdiction over its wharves and other improvements and vessels attached thereto, if that were what the parties contemplated in 1905. Moreover, the New Jersey-New York compact was the focus of notable litigation in both New York and New Jersey – and in this Court – in the years leading up to and surrounding the adoption of the Compact involved in the present action. *See Central R.R. of New Jersey v. Mayor of Jersey City*, 56 A. 239 (N.J. Sup. Ct. 1903) (holding that New Jersey as sovereign retained the right to tax lands under the western half of the river, despite the fact that the compact gave New York exclusive jurisdiction over that territory), *aff'd mem.*, 61 A. 1118 (N.J. 1905), *aff'd*, 209 U.S. 473 (1908); *New York v. Central R.R. Co. of New Jersey*, 42 N.Y. 283 (1870) (holding that New Jersey's "exclusive jurisdiction" over wharves barred New York from declaring them nuisances).

In light of New Jersey's involvement as a party to the 1834 compact with New York and the likely awareness by the drafters of the 1905 Compact of the earlier compact, significance can be drawn from the notable distinctions between the two documents. In construing ambiguous language in an interstate compact, it is appropriate to seek guidance from comparable language in other compacts. *See Oklahoma v. New Mexico*, 501 U.S. at 235 n.5

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[122] A table comparing several provisions of both interstate compacts that contain virtually identical language is included at Appendix J.

("we have on occasion looked to evidence regarding the negotiating history of other interstate compacts"); *Arizona v. California*, 292 U.S. 341, 359-360 (1934)). Here, that comparison reveals that, in the 1834 compact with New York, New Jersey explicitly retained exclusive jurisdiction over its wharves and other improvements along its shore; in the 1905 Compact with Delaware, New Jersey did not. This conspicuous disparity further supports the conclusion that the reservation of "riparian jurisdiction" in Article VII does not bestow upon New Jersey exclusive jurisdiction over all riparian improvements that extend onto Delaware's land.[123]

B. Construing "Riparian Jurisdiction" in Light of the States' Course of Conduct Since Ratification of the Compact.

The States' course of conduct since ratification of the Compact in 1905 also supports the conclusion that the States essentially have interpreted and applied the Compact to provide overlapping jurisdiction over projects extending beyond the low water mark. In interpreting the meaning of Article VII of the Compact, it is appropriate to consider the parties' course of dealings in the years since its ratification. *See United States v. Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the

[123] Delaware also points to an interstate compact between New Jersey and Pennsylvania entered into in 1783 that concerned rights along another portion of the River. (DA 4403). The language of that compact is sufficiently different from that contained in the Compact that it is not useful in attempting to glean the meaning of Article VII.

agreement they signed."); *see also O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259-60 (1984).[124]

1. Delaware's Common Law Riparian Oversight.

At the time the States entered into the Compact in 1905, and continuing beyond the middle of the twentieth century, Delaware had no formal regulatory system in place governing riparian or coastal development. Rather, riparian improvements were governed under its common law and generally were limited only to the extent they constituted a public nuisance. Moreover, unlike New Jersey, Delaware did not issue grants or leases for subaqueous lands under its common law. *See, e.g., Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (1882); *State v. Reybold*, 5 Harr. 484, 1854 WL 847 (Del. Ct. Gen. Sess. 1854); *Delaney v. Boston*, 2 Harr. 489, 1839 WL 165 (Del. Super. Ct. 1839). Thus, the fact that there is little evidence of Delaware's active involvement in shoreland development prior to the mid-1900s, on either its own shore or the New Jersey shore, by itself is not evidence of any active decision by Delaware that it

[124] *Cf. Bell v. New Jersey*, 461 U.S. 773, 784 (1983) (involving subsequent legislative enactments to the same statute, and noting that a particular interpretation "enjoys the support of later Congresses," which "does not establish definitively the meaning of an earlier enactment, but it does have persuasive value"); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (involving subsequent amendment of the same statute, and stating that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure") (internal citations omitted).

could not or would not regulate riparian improvements on the eastern shore. Similarly, the fact that Delaware has not opted to tax improvements on New Jersey's shore is not indicative of any affirmative recognition by Delaware that it lacked jurisdiction to do so. That is particularly true in light of legislative enactments by Delaware specifically recognizing that its boundary reached to the eastern side of the River.[125]

2. Delaware's Subaqueous Land Statutes.

In 1961 Delaware enacted its first statute regulating subaqueous lands.[126] Five years later, in 1966, Delaware enacted a broader Underwater Lands Act that contained provisions governing the lease of subaqueous lands by the State.[127] Then three years later, in 1969, Delaware adopted regulations implementing the Underwater Lands Act.[128] Delaware thereafter grandfathered improvements such as piers and wharves built before the 1969 regulations took

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[125] *See* 40 Del. Laws ch. 179 (1935) (defining the boundary of the City of Wilmington as the "low water mark upon the easterly shore of the Delaware River," but restricting the City from taxing property on the eastern side of the River "until the final determination of the effect of an agreement or compact entered into in the year 1905 between the States of New Jersey and Delaware, known as the compact of 1905") (NJA 317a).

[126] *See* 53 Del. Laws ch. 34; Del. Code Ann. tit. 7, § 4520 (repealed 1966).

[127] *See* 55 Del. Laws ch. 442, § 1; Del. Code Ann. tit. 7, §§ 6151-6159 (repealed 1986).

[128] *See* Delaware Water and Air Resources Commission, Regulations Governing the Use of Water Resources and Public Subaqueous Lands, Regulation IV (adopted July 14, 1969) (DA 4023).

effect, but required permits before allowing any modifications to those grandfathered structures.[129] In 1986 Delaware adopted its present Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72, that authorizes DNREC to regulate any potentially polluting use made of Delaware's subaqueous lands and to grant or lease property interests in those state lands. *See* Del. Code Ann. tit. 7, § 7206(a).

3. Delaware's Coastal Zone Statutes.

As discussed earlier, Delaware also enacted the DCZA in 1971, designed generally to "protect the environment by controlling and abating pollution in the State." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 907 (Del. 1994). The DCZA prohibits "[h]eavy industry uses of any kind" and "offshore gas, liquid or solid bulk product transfer facilities" within the coastal zone. Del. Code Ann. tit. 7, § 7003. It was the DCZA that Delaware, through the DNREC, relied upon to deny permits for the construction of the Crown Landing facility in this case.

In the following year, 1972, Congress enacted the federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq*. The CZMA provides that coastal States may submit their own coastal management programs to the Secretary of Commerce for review and approval, and in return – upon approval – receive federal funding for their coastal management programs. *See* 16 U.S.C. §§ 1454-1455.

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[129] *See* Affidavit of William Moyer ("Moyer Aff.") ¶¶ 5-7 (DA 4350-51).

Delaware's coastal management plan, approved by the federal government in August 1979, includes a discussion of LNG facilities and concludes "that there is no site in Delaware suitable for the location of any LNG import-export facility."[130] Delaware's coastal management plan also rejected Salem County, New Jersey's criticism that "Delaware law, in particular the [DCZA], unduly restricts development along the Delaware River in New Jersey," responding that "Delaware's jurisdiction extends to the low water mark on the New Jersey shore."[131] Thus, Delaware concluded that "[i]nasmuch as coastal resources of Delaware may be affected by certain uses of such waters, the Delaware CMP has opposed Salem County efforts to waive the [Act's] regulatory provisions which may relate to development in Salem County."[132] Contemporaneously, Delaware's Attorney General issued a formal opinion in 1978 concluding that the DCZA prohibited bulk transfer facilities located on Delaware's soil on a pier originating on the New Jersey shore.[133]

Even more tellingly, New Jersey's own Coastal Zone Management Program and Final Environmental Impact Statement, dated August 1980, states, "The New Jersey and Delaware Coastal Zone Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water must

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[130] National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Delaware Coastal Management Program and Final Environmental Impact Statement (Mar. 1980) (DA 2591).

[131] *Id.* (DA 2600, 2605).

[132] *Id.* (DA 2605).

[133] Del. Op. Att'y Gen. 78-018 (1978) (DA 3881).

obtain coastal permits from both states."[134] New Jersey thus represented in its own coastal management plan that it agreed with Delaware that the States have overlapping oversight or jurisdiction over riparian improvements extending off New Jersey's shore, at least to the extent they reach beyond the low water mark. It is hard to imagine how New Jersey can maintain today, several decades later, that Delaware has never had any right to exercise regulatory authority over similar riparian structures. New Jersey attempts to downplay its actions by stating that, during the decades between the 1970s and 1990s, it "experimented with efforts to coordinate its exercise of jurisdiction with Delaware."[135] Yet, however characterized, New Jersey's cooperation with Delaware in allowing Delaware to regulate improvements originating on New Jersey's shore is fundamentally inconsistent with the position advanced by New Jersey here, *i.e.*, that only New Jersey has the right to regulate such projects.

Therefore, essentially from the commencement of its adoption of formal regulatory oversight over coastal waters and subaqueous lands, Delaware has maintained – and, to some extent, New Jersey has agreed – that Delaware has regulatory authority over riparian improvements extending outshore from the low water mark on the eastern shore of the River. That history supports the conclusion that Delaware is entitled to exercise regulatory jurisdiction pursuant to its sovereign police powers over riparian improvements extending from the New Jersey

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[134] New Jersey's Response to Requests for Admissions No. 62 (DA 4177).

[135] New Jersey's Brief in Support of Motion for Summary Judgment at 21.

shore onto Delaware's territory, and that the Compact was not intended to eliminate those powers.

4. Delaware's Regulation of Projects On and Outward from the New Jersey Shore Within the Twelve-Mile Circle.

The record contains evidence that fourteen wharves or structures were built off the New Jersey shore between 1851, when New Jersey began issuing riparian grants, and 2006 that extend outshore of the low water mark and have been able to accept docking vessels.[136] Eleven of those improvements were constructed before 1969, prior to Delaware's adoption of any formal regulations for approving construction of such improvements. Hence all were subject only to Delaware's prior common law of nuisance at the time they were built. Moreover, they were grandfathered under Delaware's first set of administrative regulations governing subaqueous lands enacted in 1969 implementing the Underwater Lands Act.[137] Since 1969, only three additional riparian structures have been built within the disputed territory.[138] And Delaware has regulated all three of those projects.

In 1971, Delaware granted a subaqueous lands lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware subaqueous soil, build a dock, and construct a fuel oil storage tank at a facility extending past the

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[136] Affidavit of Laura M. Herr ("Herr Aff.") ¶¶ 18-31 (DA 4328-37).

[137] *See id.* ¶¶ 27-31 (DA 4332-37).

[138] Affidavit of William S. Schenck ("Schenck Aff.") ¶ 12 (DA 4373).

boundary from the New Jersey shore.[139] Since then, Delaware has issued numerous permits for activities at DuPont's facility that extend past the boundary and into Delaware territory.[140]

In 1990 and 1991, Delaware issued a status determination ruling that a coal unloading pier extending outshore of the New Jersey shore proposed by Keystone Cogeneration Systems was a permissible use under the DCZA, and issued a DCZA permit for that project.[141] Delaware also issued a subaqueous lands lease for that project, along with subsequent renewals.[142] New Jersey acknowledges in its summary judgment brief that "Delaware also approved the Keystone pier," without offering any explanation as to why Delaware's actions in asserting jurisdiction – apparently with New Jersey's awareness – should be disregarded.[143]

Most compellingly, Delaware issued a permit in 1996 to New Jersey's Parks and Forestry Division (located

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[139] *See* Delaware Subaqueous Lands Lease (SL-558/1971) issued to DuPont (Sept. 29, 1971) (DA 3403). Because DuPont disputed Delaware's authority to require a lease for that land, Delaware agreed to forego collecting lease payments until the dispute over the outshore lands was resolved, and according to New Jersey, there is no evidence that DuPont has ever made any lease payments to Delaware. *See* Letter from Mr. Fogg to Mr. Lane, dated June 7, 1971 (NJA 648a); New Jersey's Brief in Support of Motion for Summary Judgment at 19.

[140] Moyer Aff. ¶¶ 13-18 (DA 4349).

[141] Affidavit of Philip Cherry ("Cherry Aff.") ¶ 8 (DA 4303); *see* DNREC Coastal Zone Permit issued to Keystone Cogeneration Systems, Inc. (Dec. 13, 1991) (DA 3607).

[142] Moyer Aff. ¶¶ 23-27 (DA 4355); Herr Aff. ¶¶ 10-12 (DA 4326).

[143] New Jersey's Brief in Support of Motion for Summary Judgment at 15 n.11.

within the New Jersey Department of Environmental Protection) to refurbish a stone pier at New Jersey's Fort Mott State Park.[144] Under the arrangement between New Jersey and Delaware, New Jersey issued a waterfront development permit of its own for the project, but New Jersey's permit approved structures *only* to the low water mark. As a result, the project required Delaware's approval for structures outshore of that point.[145] And as recently as August 2006, while this action was pending, New Jersey again applied to Delaware for a renewal of that permit.[146] Once more, New Jersey acknowledges in its summary judgment brief that the permit that New Jersey issued to itself for rehabilitation of the pier also "required approval by Delaware of certain activities outshore of low water."[147] However, New Jersey provides no plausible explanation as to why it would have done so if it did not agree that Delaware had regulatory authority over outshore lands. Thus, New Jersey itself – for its own State-run projects – has sought permits from Delaware for improvements built on New Jersey's shore extending beyond the low water mark.

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[144] *See* DNREC Subaqueous Lands Lease (SL-1110/95) issued to the State of New Jersey Department of Environmental Protection Division of Parks and Forestry (Feb. 7, 1996) (DA 3715); Moyer Aff. ¶ 30 (DA 4356); Herr Aff. ¶ 13 (DA 4326).

[145] *See* New Jersey Fort Mott State Park Permit, January 24, 1996 (NJA 882a).

[146] *See* New Jersey State Park Service Subaqueous Lands Lease Renewal Application (Aug. 16, 2006) (DA 3731); Herr Aff. ¶ 14 (DA 4327).

[147] New Jersey's Brief in Support of Motion for Summary Judgment at 15 n.13.

New Jersey's only asserted distinction, raised at oral argument, was that the Fort Mott project involved not only construction of a pier, but also ferry service that New Jersey's counsel thought might connect to Delaware parks on the opposite side of the River. According to New Jersey, the ferry service connecting New Jersey to Delaware necessarily required a cooperative approach between the two States, and should not be read as acquiescence by New Jersey in Delaware's regulation of the riparian improvements. But New Jersey's distinction is belied by the permits issued for the Fort Mott project. It is clear from the permits – including those issued by New Jersey – that Delaware regulated the construction of the pier itself outshore of the low water mark, and New Jersey not only agreed to that regulation but sought it. Thus, Delaware's involvement was not confined to coordinating ferry schedules or routes or other matters tangential to the approval of the construction of the riparian improvements themselves. By agreeing to such regulation, New Jersey has directly acknowledged the conclusion reached here, namely, that Delaware does have jurisdiction under its police powers to regulate matters occurring in its own waters and on its own soil.

5. New Jersey's Consent to Delaware's Involvement in Regulating Projects On and Outward from the New Jersey Shore Within the Twelve-Mile Circle.

In addition to acknowledging that Delaware has a role in issuing permits for the riparian improvements at New Jersey's own Fort Mott state park, New Jersey has engaged in an extensive pattern of dialogue and cooperation with Delaware over the past several decades that

demonstrates, in some cases explicitly and in others implicitly, a recognition of Delaware's right to regulate projects on and outward from New Jersey's shore.

Like Delaware, New Jersey engaged in a comprehensive process for developing a coastal management plan pursuant to the federal CZMA, adopted in order to obtain federal funding for coastal management. New Jersey began its coastal management plan development in 1973, and received federal approval of its plan in 1978 and 1980. In its 1978 coastal management plan that addressed the boundary, New Jersey observed that "[r]esolution of potential conflicts between the coastal policies of Delaware and New Jersey will require continued coordination and work in the first year of Program approval, toward appropriate agreements between [sic] the coastal management programs of both states, Salem County and the affected municipalities."[148] New Jersey recognized the lingering jurisdictional issues, and stated that "[NJDEP] will also work with the NJDOE, the Attorney General of New Jersey" and other entities "in the next year to resolve boundary issues between [sic] New Jersey, Delaware and New York."[149]

The following year, New Jersey issued a March 1979 report entitled "Options for New Jersey's Developed Coast." There, New Jersey reviewed Delaware's various coastal zone laws and their applicability to the New Jersey

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[148] NJDEP, New Jersey Coastal Management Program – Bay and Ocean Shores Segment and Final Environmental Impact Statement (Aug. 1978) (DA 2327).

[149] *Id.* (DA 4630).

shore.[150] In an appendix to that report, New Jersey observed that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey."[151] New Jersey specifically found that the DCZA does apply to projects that straddle the low water mark boundary. As the report states:

> In 1971, the State of Delaware enacted a stringent Coastal Zone Act, which prohibited heavy industrial development in a defined coastal zone. Since the boundary between New Jersey and Delaware extends to the New Jersey shoreline, the restrictive provisions of this coastal management law applied to development that would be proposed for sites involving land and water along the Salem County Waterfront. . . . The law also prohibits offshore "bulk product transfer facilities" which include port or dock facilities for the transfer of bulk quantities of any substance, such as oil. . . . Consequently, under Delaware law, some types of activities would be prohibited from locating along the Delaware River in Salem County, while other facilities desiring to locate along the river would need to obtain permit approval from the State of Delaware.[152]

The report went on to recognize the applicability of Delaware's submerged lands laws, stating:

> Because the State of Delaware exercises jurisdiction along the Salem County shoreline from the

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[150] *See* NJDEP, Options for New Jersey's Developed Coast (Mar. 1979) (DA 2383).

[151] *Id.* (DA 2509).

[152] *Id.*

> mean low water line waterward, projects involving the use of public submerged lands would require approval under Delaware's Underwater Lands Act. This Act authorizes Delaware to exercise authority over state lands lying below Delaware's mean high waterline [sic]. Projects requiring approval include: (1) erection of any structure on such lands, (2) dredging or filling of such land, (3) the excavation of any channel, lagoon, turning basin, or ditch on public or private lands which will make connection with public submerged lands, (4) the filling of lands adjacent to public submerged lands and (5) laying of any pipeline, transmission line or telephone line in, on, over or under the beds of public submerged lands.[153]

New Jersey concluded its report by acknowledging that its jurisdiction is limited to "a narrow strip of tidelands between the mean high water line and the mean low water line in Salem County."[154] Highlighting the cooperative relationship necessary for any improvements on New Jersey's shore, the report further stressed that "Delaware has agreed to notify Salem County of any proposed activity along the Delaware or Salem County shoreline which is subject to [the DCZA]," and in turn "Delaware has asked Salem County to notify Delaware of any proposed development in Salem County which would fall under [DCZA] jurisdiction."[155]

New Jersey thereafter obtained federal approval of a 1980 coastal management plan that covered the twelve-mile

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[153] *Id.* (DA 2510).

[154] *Id.* (DA 2511).

[155] *Id.*

circle as well as additional coastal lands.[156] Regarding the question of jurisdiction over development, New Jersey's 1980 plan even more clearly recognized that Delaware has the right to exercise regulatory jurisdiction within the twelve-mile circle.

> In most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River. The New Jersey and Delaware Coastal Management agencies have discussed this issue and have concluded that any New Jersey project extending beyond mean low water *must obtain coastal permits from both states*. New Jersey and Delaware, therefore, will coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs.[157]

Evidently neither the New Jersey Attorney General nor any of the state agencies that reviewed the 1980 plan disputed that conclusion. Salem County, New Jersey, on the other hand, *did* dispute that conclusion, noting that it was "strongly opposed to the statement in this revision that any project in the area must be consistent with both Delaware's and New Jersey's coastal programs and obtain permits from two states."[158] However, New Jersey's final plan in 1980 specifically rejected Salem County's resistance to the State's acknowledgment of Delaware's regulatory jurisdiction, reporting that the "disagreement is

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[156] *See* NOAA, New Jersey Coastal Management Program and Final Impact Statement (Aug. 1980) (DA 2627).

[157] *Id.* (emphasis added) (DA 2657).

[158] *Id.* (DA 3135).

noted, but [NJDEP] has found no other solution available by administrative action to address the peculiar N.J.-Delaware boundary in Salem County, where the Delaware State line reaches to low tide on the New Jersey shore."[159] Perhaps most presciently, New Jersey's 1980 plan actually addressed LNG facilities, and stated that New Jersey "considers decisions concerning the siting of LNG terminals to be an *interstate* matter."[160]

In the next decade, New Jersey's recognition of Delaware's jurisdiction over projects on the eastern shore of the River continued. In 1991, New Jersey officials began to draft a memorandum of agreement with Delaware officials setting forth parameters for cooperation between the States in overseeing development along the River. Steven Whitney, NJDEP's Assistant Director of the Coastal Resources Division, and other NJDEP staff prepared a detailed summary of New Jersey's and Delaware's coastal regulations that they shared with their counterparts in Delaware.[161] A related memorandum prepared in connection with discussions with Delaware by Rick Sinding, an Assistant Commissioner at NJDEP, also noted that "the State of Delaware's [CMP] may directly and significantly affect activities within New Jersey that are inconsistent with New Jersey's [CMP]."[162] New Jersey then prepared multiple drafts of a proposed memorandum of agreement with Delaware, acknowledging that "[b]oth [State] agencies

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[159] *Id.*

[160] *Id.* (emphasis added) (DA 2891).

[161] Letter from Steven C. Whitney, NJDEP, to Anthony T. Manus, Delaware Department of Natural Resources and Environmental Control, dated Nov. 8, 1991, with attachments (DA 3209).

[162] Memorandum from Rick Sinding to Management Team, dated Nov. 1, 1991 (DA 3234).

recognize that each agency has the independent authority to approve or deny applications pursuant to its own regulations."[163] Ultimately, the States never executed the draft memorandum of agreement. Nevertheless, the multiple iterations of the draft – prepared by New Jersey – all recognized Delaware's right to regulate under Delaware law projects extending outshore of the boundary.

Finally, in connection with BP's proposal to construct an LNG facility on New Jersey's shore that precipitated New Jersey's filing of this original action, New Jersey previously took a position – before deciding to commence these proceedings before this Court – that accepted Delaware's authority to regulate the environmental impact of at least the portion of the proposed project to be located in Delaware. In comments filed with the Federal Energy Regulatory Commission on April 25, 2005 (but dated February 4, 2005), only a few months before seeking leave to reopen *New Jersey v. Delaware II*, New Jersey stated:

> The project site is located in the States of Delaware and New Jersey. Accordingly, activities taking place from the mean low water line (MLWL) outshore are located in the State of Delaware and therefore *are subject to Delaware Coastal Zone Management Regulations*. Activities or associated impacts to New Jersey's coastal resources occurring from the MLWL landward are the subject of this application [to NJDEP].[164]

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[163] (DA 3267-68, 3273-74) (8/3/93 draft); (DA 3175) (10/18/93 draft); (DA 3182, 3253, 3261) (10/28/93 draft); (DA 3192, 3198) (11/5/93 draft); (DA 3203, 3239, 3245) (6/16/94 draft).

[164] Letter from David Q. Risilia, Project Manager, New Jersey's Office of Dredging and Sediment Technology, to David Blaha, at Environmental Resources Management, dated Feb. 4, 2005 (emphasis

(Continued on following page)

In other words, even in connection with the project that spawned the present action, New Jersey originally represented to the federal government that Delaware *does* have regulatory jurisdiction over the project to the extent it spans the boundary at the low water mark.

Thus, for a period of several decades since Delaware first adopted a system of shore land statutes and regulations, the parties have followed a consistent pattern of understanding that Delaware had overlapping jurisdiction to regulate developments on the New Jersey shore extending beyond the low water mark. Such overlapping jurisdiction is consistent with the preservation of "riparian jurisdiction" to New Jersey provided in Article VII of the Compact.

Conclusion: The Riparian Jurisdiction Issue

Overlapping jurisdiction by two sovereigns may pose practical difficulties. But that result is compelled by the language of the Compact and has been followed by the States since they began actively regulating riparian developments several decades ago. Practical difficulties alone do not permit the Court to rule in favor of New Jersey in the face of language and practice to the contrary. *Cf. New Jersey v. New York*, 523 U.S. at 810 (rejecting

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added) (DA 4641). That letter, apparently prepared in response to BP's Crown Landing waterfront development application to New Jersey, contained a finding that BP's application was deficient under New Jersey law. New Jersey later submitted the letter to the Federal Energy Regulatory Commission in connection with New Jersey's comments on the Draft Environmental Impact Statement for the Crown Landing project. (DA 4673). New Jersey later wrote to Mr. Blaha asking him to "disregard" its representations. *See* Letter from Joseph J. Seebode, Assistant Commissioner, NJDEP, to David Blaha, at Environmental Resources Management, dated May 24, 2005. (DA 4683).

Special Master's recommendation that the Court adjust the boundary line on Ellis Island to avoid cutting through existing buildings "for reasons of practicality and convenience," concluding that "these drawbacks are the price of New Jersey's success in litigating under a compact whose fair construction calls for a line so definite"). Nor can the Court rewrite the Compact to achieve a result that in hindsight might be more efficient and workable under present day scenarios. *Cf. Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 47 (1979) ("Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' ").[165] This case does not require a determination of the precise extent of Delaware's regulatory jurisdiction, but only whether Delaware may exercise any jurisdiction over wharves and other improvements extending outshore of the boundary.

The Compact does not preserve for New Jersey exclusive jurisdiction over riparian improvements extending off New Jersey's shore beyond the low water mark. Rather, while New Jersey may exercise riparian jurisdiction over such projects, Delaware, as the sovereign with title to the water and outshore land, is entitled to exercise jurisdiction pursuant to its police powers over such projects to the extent they encroach onto Delaware's territory. Therefore, I conclude that:

> **The preservation of "riparian jurisdiction" contained in Article VII of the Compact does not bestow upon New Jersey regulatory jurisdiction over all aspects of riparian**

[165] The internal quotation comes from Edward Fitzgerald's translation of quatrain LI of "The Rubaiyat of Omar Khayyam."

improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark within the twelve-mile circle of the Delaware River; rather, New Jersey's jurisdiction outshore of that low water mark is limited to regulation of riparian rights associated with improvements extending onto Delaware's territory.

Delaware, as the sovereign owner of the land outshore of the low water mark on the eastern shore of the Delaware River within the twelve-mile circle, is entitled to exercise police power jurisdiction over improvements extending onto its territory, and accordingly New Jersey's riparian jurisdiction over such improvements is not exclusive.

III. The Estoppel Issue.

New Jersey argues that, even if Article VII does not expressly reserve to New Jersey the exclusive jurisdiction to exercise regulatory jurisdiction over riparian improvements on the eastern shore of the Delaware River, Delaware should be judicially estopped from disputing New Jersey's position that it does, because of representations made by Delaware during the course of proceedings in *New Jersey v. Delaware II*. Delaware, in that case, did indeed make many representations concerning the scope of New Jersey's authority to make grants, leases and conveyances of riparian *rights* and it is bound by those representations in this action. Now going further, New Jersey asserts that Delaware made representations concerning the scope of New Jersey's preserved riparian *jurisdiction* that also should bind Delaware today. However, close

examination of those representations in the context in which they were made shows them insufficient to estop Delaware from challenging New Jersey's claim to exclusive riparian jurisdiction in this litigation.

The doctrine of judicial estoppel applies in original jurisdiction actions between States. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("we conclude that a discrete doctrine, judicial estoppel, best fits the controversy"). Under that doctrine, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.*

The factors to be considered in determining whether to estop a party from taking a position contrary to a position taken in a prior litigation are: whether a party's current position is "clearly inconsistent" with its earlier position; whether "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-51 (internal quotations omitted).

To support its estoppel claim, New Jersey points to the following statements made by Delaware before the Special Master in *New Jersey v. Delaware II*. First, in one of its

briefs submitted to the Special Master in that case, Delaware stated, "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and *a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.*"[166] Second, in oral argument before the Special Master in that case, Delaware's counsel asserted that "the Compact of 1905 *ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them*, and it was a very sensible thing to do."[167]

Taken out of context and in isolation, those comments arguably could be read to support New Jersey's claim to exclusive jurisdiction over riparian projects on the New Jersey shore, and that Delaware agreed that the Compact preserved such jurisdiction for New Jersey regardless of where the boundary might be. However, a closer analysis

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[166] Delaware's Reply Brief to Special Master in *New Jersey v. Delaware II* at 9 (emphasis added) (NJA 123a).

[167] Statement of Clarence Southerland in Transcript of Oral Argument Before Special Master in *New Jersey v. Delaware II* at 91 (emphasis added) (NJA 126a-1). Delaware suggests that, because those representations were made to the Special Master rather than directly to this Court, there is no basis for application of judicial estoppel, because the Special Master was only empowered to issue a recommendation, not a binding decision. Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment at 50-51. Delaware has not cited any caselaw directly supporting that proposition. Because it is clear for other reasons that Delaware is not judicially estopped from challenging New Jersey's claim to exclusive jurisdiction under the facts of this case, it is unnecessary to determine whether a party's inconsistent representations made to a Special Master in an action under this Court's original jurisdiction can ever form the basis for such an estoppel. *Cf. Anjelino v. New York Times Co.*, 200 F.3d 73, 100 (3d Cir. 1999) (affirming district court's application of judicial estoppel in the context of a party's representation made to a magistrate judge).

in the context of other statements by Delaware in *New Jersey v. Delaware II*, makes it apparent that New Jersey is reading too much into those remarks.

First, Delaware's representation that it had ceded to New Jersey "jurisdiction to regulate" riparian rights, and "all the right to control the erection of those wharves and to say who shall erect them," does not necessarily mean that Delaware was conceding that it had ceded *exclusive* jurisdiction to New Jersey over any and all matters related to riparian improvements on the eastern shore of the River. In fact, Delaware's statements are fully consistent with the interpretation of Article VII reached here, namely, that the States agreed to preserve for New Jersey the right to exercise its own jurisdiction over riparian improvements appurtenant to its shore, and the authority to grant riparian rights. Beyond that, however, New Jersey has not pointed to any statements by Delaware in which it suggested that New Jersey would have the *exclusive* authority to regulate all aspects of riparian improvements, even if on Delaware's land.

Second, Delaware's comments were made in the context of the States' briefing of the boundary issue. The scope of New Jersey's jurisdiction over riparian improvements on its shores, although relevant to that inquiry, was not dispositive. Delaware argued to the Court – and prevailed on – its theory that the States' common boundary should be located at the low water mark. It would be odd indeed if Delaware simultaneously took the position that – even if the boundary were so located – Delaware would have no sovereign jurisdiction over the land that it continuously asserted it owned. If that were the case, Delaware's victory in *New Jersey v. Delaware II* would be a Pyrrhic one. Delaware never would have intended that its

statements about jurisdiction have the broad reach now ascribed to them by New Jersey. Rather, it is clear that Delaware intended only that Article VII reserve a limited amount of jurisdiction for New Jersey on the eastern shore.[168]

Third, Delaware did not repeat the language highlighted by New Jersey in its briefs before this Court on the States' exceptions to the Special Master's recommendations in *New Jersey v. Delaware II*. Rather, in its later briefing Delaware expressed its understanding regarding jurisdiction in a different manner, stating,

> Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. The boundary line would continue to be low water mark.[169]

That representation suggests only that Delaware acknowledged that, at most, the Compact had "ceded" to New Jersey the authority to regulate riparian rights off New Jersey's shore directed toward Delaware's waters, regardless of where the boundary eventually was located. It does not suggest that Delaware had given up any claim of jurisdiction also to regulate such improvements to the extent they actually do intrude onto Delaware territory. That narrower reading also is consistent with the course of conduct of both States over the past several decades. Not only has Delaware regulated improvements on New

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[168] *See supra* note 84.

[169] Delaware's Reply Brief to this Court in *New Jersey v. Delaware II* at 29 (NJA 142a).

Jersey's shore, but, in at least some instances, New Jersey has expressly acquiesced in such regulation.

New Jersey has thus taken out of context the isolated remarks by Delaware in *New Jersey v. Delaware II*. Therefore, the position advanced by Delaware in this action is not "clearly inconsistent with its earlier position," and thus there is no basis for judicially estopping Delaware from disputing New Jersey's claim to exclusive regulatory jurisdiction over riparian improvements on the eastern shore. *New Hampshire v. Maine*, 532 U.S. at 750. That contrasts with Delaware's repeated statements in *New Jersey v. Delaware II* concerning Delaware's agreement that New Jersey continued to retain the authority to make grants of riparian rights, including the right to wharf out, that are fundamentally at odds with the position it has taken in this litigation. Delaware's prior statements concerning riparian *jurisdiction* do not justify judicial estoppel.

Conclusion: The Estoppel Issue

Delaware's prior statements in *New Jersey v. Delaware II* concerning New Jersey's jurisdiction under Article VII of the Compact are not clearly inconsistent with the position it has taken in this action, namely, that the riparian jurisdiction preserved for New Jersey in the Compact is non-exclusive. Accordingly, Delaware is not judicially estopped from challenging New Jersey's contention that New Jersey alone has jurisdiction to regulate any riparian improvements occurring on New Jersey's shore. Therefore, I conclude that:

Delaware is not estopped from challenging New Jersey's assertion of exclusive jurisdiction to regulate riparian improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

IV. The Prescription Issue.

New Jersey also argues that, even if the Compact does not give it exclusive jurisdiction to regulate riparian improvements emanating from the eastern shore of the Delaware River, Delaware has lost its sovereign right to exercise jurisdiction over its own lands through prescription and acquiescence.[170] Even assuming that the doctrine of prescription and acquiescence applies in the context of an interstate compact approved by Congress,[171] New Jersey, to succeed, must "'show by a preponderance of the evidence . . . a long and continuous . . . assertion of sovereignty over'" Delaware's territory, as well as Delaware's acquiescence in New Jersey's prescriptive acts. *New Jersey v. New York*, 523 U.S. at 787 (quoting *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991)).

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[170] Delaware conceded at oral argument that it is not advancing any argument of prescription and acquiescence against New Jersey in its motion for summary judgment. *See* Transcript of Oral Argument held on Feb. 22, 2007, at 124-25.

[171] New Jersey candidly states that it "is not apparent, however, that one state can lose a federally-approved compact right through prescriptive acts of another state, as this would amount to one state unilaterally altering a federal law. To our knowledge, no case has held that prescription can alter a federally-approved compact." New Jersey's Brief in Support of Motion for Summary Judgment at 40 n.23.

"Although 'we have never established a minimum period of prescription' necessary for one State to prevail over a coequal sovereign on a claim of prescription and acquiescence, we have noted that the period must be 'substantial.'" *Virginia v. Maryland*, 540 U.S. at 76 (quoting *New Jersey v. New York*, 523 U.S. at 786, 789). With few exceptions, the acquiescence cases between sovereign States show that the period for finding acquiescence must be extensive – in many cases approaching or exceeding 100 years.[172] In *Virginia v. Maryland*, the Court noted – although it did not conclusively hold – that a period of 32 to 43 years likely was inadequate for proving prescription in an original jurisdiction case. *See id.* at 77. New Jersey agrees that, to prevail on a claim of prescription, it must prove at a minimum that it exercised exclusive jurisdiction over riparian improvements on Delaware's land for "significantly long[ ] periods."[173] Yet New Jersey has not established any appreciable period of time when it exercised exclusive jurisdiction over riparian improvements on the eastern shore of the River, except prior to the era of any active regulation by Delaware even on Delaware's own shore.

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[172] *See Georgia v. South Carolina*, 497 U.S. 376, 392-93 (1990) (over 130 years); *California v. Nevada*, 447 U.S. 125, 126 (1980) ("the better part of a century"); *Ohio v. Kentucky*, 410 U.S. 641, 650-52 (1973) (150 years); *Arkansas v. Tennessee*, 310 U.S. 563, 567-72 (1940) (over 100 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (90 years); *Virginia v. Tennessee*, 148 U.S. 503, 524 (1893) (over 85 years). *But see Nebraska v. Wyoming*, 507 U.S. 584, 594-95 (1993) (stating in dicta that a 41-year period was adequate for prescription).

[173] New Jersey's Brief in Support of Motion for Summary Judgment at 41.

In addition, in order to prove that Delaware has lost any right to assert jurisdiction over its own territory, New Jersey must prove that Delaware "'failed to protest' her assertion of sovereign authority" to exercise exclusive jurisdiction over riparian improvements outshore of the boundary. *Id.* (quoting *New Jersey v. New York*, 523 U.S. at 807). New Jersey has not met its burden of proving acquiescence under the unique circumstances of this case.

New Jersey begins by arguing that between 1854 and 1971, New Jersey, through either its legislature or the Board of Riparian Commissioners, issued numerous grants and leases for tidelands conveyances and development on its shoreline, and authorized the construction of piers and wharves extending outshore of the low water mark.[174] New Jersey also enacted legislation dating to the 1800s that generally regulated wharfing and subaqueous lands along its shores, including – but not specifically directed at – the disputed land.[175]

However, that evidence misses the mark. As in *Virginia v. Maryland*, the boundary between New Jersey and Delaware is not now in dispute, having been conclusively resolved by this Court in *New Jersey v. Delaware II*. Thus, evidence of New Jersey approving the construction of wharves or otherwise exercising riparian rights – even assuming Delaware acquiesced in such conduct – has no bearing on New Jersey's burden to prove specifically that Delaware acquiesced in New Jersey's exercise of *exclusive* jurisdiction over riparian development on the eastern

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[174] *See* Appendix I.

[175] *See, e.g.*, Wharf Act, 1851 N.J. Laws, p. 335 (NJA 206a); 1869 N.J. Law, ch. 383, N.J. Stat. Ann. § 12:3-2 (NJA 232a).

shore. Such evidence arguably could show an understanding by the States that New Jersey is entitled to grant riparian rights and exercise some level of jurisdiction over those improvements, authority that is expressly confirmed by the Compact. However, it would not establish any understanding or agreement by Delaware that New Jersey's right to exercise such jurisdiction is exclusive or that it deprives Delaware of overlapping jurisdiction over improvements extending onto its own lands.

In other words, New Jersey must prove more than that it engaged in riparian activities on its shores, while Delaware historically did not. It must prove that Delaware in some demonstrable way agreed with New Jersey's claim that New Jersey alone was entitled to exercise such powers. *See Virginia v. Maryland*, 540 U.S. at 77 n.10 ("Maryland's evidence that Virginia has never operated a permitting system for water withdrawal or waterway construction is insufficient to satisfy Maryland's burden."); *New Jersey v. New York*, 523 U.S. at 788 n.9 (rejecting prescription claim by New York based on New Jersey's failure to act on territory in dispute, because "New York cannot meet its burden of proving prescription by pointing to New Jersey's failure to present evidence that it exercised dominion over the filled portions of the Island"). Therefore, the fact that Delaware did not adopt a regulatory system for permitting waterfront and subaqueous development until after the middle of the twentieth century – either within the twelve-mile circle or along the remainder of Delaware's shores – does not establish that Delaware thereby acquiesced in any claim by New Jersey to the exclusive right to regulate improvements extending into the River off the eastern shore. *See, e.g., Georgia v. South Carolina*, 497 U.S. at 389 ("Inaction, in and of itself, is

of no great importance; what is legally significant is silence in the face of circumstances that warrant a response.").

New Jersey's claim that Delaware acquiesced since the 1800s in New Jersey's right exclusively to regulate improvements on its shores is belied by the contentious relationship between the two States over the River essentially from the time of American independence. Delaware consistently asserted its claim that it owned up to the low water mark on the New Jersey shore. In *New Jersey v. Delaware II*, New Jersey argued that it had acquired title to the River and subaqueous soil up to the middle of the shipping channel based on Delaware's alleged acquiescence in New Jersey's riparian grants and the construction of wharfs extending into the River. This Court rejected New Jersey's argument, noting that "almost from the beginning of statehood Delaware and New Jersey have been engaged in a dispute as to the boundary between them. There is no room in such circumstances for the application of the principle that long acquiescence may establish a boundary otherwise uncertain." *New Jersey v. Delaware II*, 291 U.S. at 376. In this action, New Jersey essentially points to the same history of riparian development to which it directed the Court's attention in *New Jersey v. Delaware II*. Just as it was insufficient to establish New Jersey's ownership or title outshore of the low water mark, so, too, is it insufficient to support New Jersey's claim that Delaware ceded to New Jersey all jurisdiction over those same waters and lands.

New Jersey argues that in more recent decades it has imposed additional regulatory and permitting requirements on proposed projects on its shore, including the introduction of expanded requirements for dredging, pier construction, discharge pipes and other water diversion

structures. Again, however, the fact that New Jersey has engaged in its own regulation of riparian development taking place on its shores, and the fact that Delaware may have been aware of New Jersey's activities in regulating projects on New Jersey's own shore, say nothing about whether Delaware has acquiesced in allowing New Jersey the exclusive right to exercise such oversight. On the contrary, the undisputed evidence shows that, since at least the 1970s, Delaware has exercised regulatory jurisdiction over projects on New Jersey's shores extending outshore of the low water mark.[176] In some cases New Jersey has itself recognized Delaware's regulatory authority and has applied for permits from Delaware for New Jersey state-run projects on its own shore,[177] a process that New Jersey describes as a "cooperative approach to a review of projects extending from the New Jersey shore beyond the low-water mark."[178] New Jersey's willingness to engage in such a "cooperative approach" is necessarily incompatible with its argument that Delaware never had any jurisdiction or basis for attempting to regulate improvements extending from New Jersey's shore into Delaware territory. *See, e.g., Illinois v. Kentucky*, 500 U.S. at 386 (stating that "we are concerned not only with what [Kentucky's] officers have done, but with what they have said, as well. And what they have said has, in several instances, supported Illinois' claim.").

In sum, evidence that New Jersey historically made conveyances of riparian rights and authorized the construction of wharves and other riparian improvements,

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[176] *See supra* Section II-D-4.

[177] *See supra* Section II-D-5.

[178] New Jersey's Brief in Support of Motion for Summary Judgment at 44.

with or without Delaware's acquiescence, is immaterial to the issue of whether Delaware has acquiesced for a "substantial" period of time in any claim by New Jersey that New Jersey alone has the exclusive right to regulate riparian developments on the eastern shore. For centuries, Delaware maintained its claim of ownership of the River up to the low water mark on New Jersey's shore. The fact that New Jersey exercised riparian rights along that boundary had no effect on Delaware's claim to title in that territory. It is also insufficient to establish that Delaware lost sovereign jurisdiction over the same land through prescription.

Since the 1960s when Delaware first promulgated a regulatory system for waterfront development along its shores, it has regulated various riparian projects extending from New Jersey's shores; and New Jersey has recognized Delaware's regulatory oversight for projects proposed both by private developers and by New Jersey itself in recent years. Although New Jersey has presented evidence that arguably shows that Delaware may have acquiesced in New Jersey exercising some jurisdiction over riparian improvements appurtenant to New Jersey's shore, it has not presented sufficient evidence to prove that Delaware effectively ceded all jurisdiction to New Jersey through the doctrine of prescription and acquiescence.

Conclusion: The Prescription Issue

New Jersey has failed to prove by a preponderance of the evidence that Delaware has acquiesced in any assertion by New Jersey that New Jersey has exclusive jurisdiction to regulate riparian improvements appurtenant to the eastern shore of the River. On balance, New Jersey has not

satisfied the stringent standards to warrant a finding that Delaware has lost the sovereign jurisdiction over its own lands that was preserved by the Compact. Therefore, I conclude that:

New Jersey has not acquired exclusive regulatory jurisdiction over riparian improvements appurtenant to its shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle pursuant to the doctrine of prescription and acquiescence.

RECOMMENDATIONS

For all the foregoing reasons, I recommend that the Court rule that:

(1) New Jersey has the authority to make grants, leases, and conveyances of riparian lands on the New Jersey side of the Delaware River within the twelve-mile circle only down to the low water mark.

(2) Consistent with New Jersey's law of riparian rights, New Jersey riparian owners may construct, maintain and use improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

(3) The preservation of "riparian jurisdiction" contained in Article VII of the Compact does not bestow upon New Jersey regulatory jurisdiction over all aspects of riparian improvements appurtenant to the New Jersey

shore extending outshore of the eastern low water mark within the twelve-mile circle of the Delaware River; rather, New Jersey's jurisdiction outshore of that low water mark is limited to regulation of riparian rights associated with improvements extending onto Delaware's territory.

(4) Delaware, as the sovereign owner of the land outshore of the low water mark on the eastern shore of the Delaware River within the twelve-mile circle, is entitled to exercise police power jurisdiction over improvements extending onto its territory, and accordingly New Jersey's riparian jurisdiction over such improvements is not exclusive.

(5) Delaware is not estopped from challenging New Jersey's assertion of exclusive jurisdiction to regulate riparian improvements appurtenant to the New Jersey shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle.

(6) New Jersey has not acquired exclusive regulatory jurisdiction over riparian improvements appurtenant to its shore extending outshore of the eastern low water mark of the Delaware River within the twelve-mile circle pursuant to the doctrine of prescription and acquiescence.

A proposed Decree embodying my recommendations is attached as Appendix A.

Respectfully submitted,

RALPH I. LANCASTER, JR.
Special Master

April 12, 2007

No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

EXCEPTIONS BY NEW JERSEY TO THE REPORT OF THE SPECIAL MASTER AND SUPPORTING BRIEF

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Article VII of the 1905 Compact between New Jersey and Delaware provides that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." New Jersey excepts to the following conclusions of the Special Master with regard to Article VII of the Compact:

1. That, although New Jersey may make grants of riparian *rights* beyond the low-water mark on the New Jersey side of the Delaware River, it cannot make grants of riparian *lands* beyond the low-water mark. Report at 52, 99.

2. That New Jersey does not have exclusive riparian jurisdiction over improvements like piers and wharves on the New Jersey side of the river if they extend beyond the low-water mark. Report at 85-86, 99-100.

3. That Delaware may exercise its police power over riparian improvements like piers and wharves extending beyond the low-water mark on the New Jersey side, even to the extent of prohibiting improvements approved by New Jersey. Report at 85-86, 99-100.

TABLE OF CONTENTS

	Page
EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER	i
TABLE OF AUTHORITIES	v
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT	2
A Regulatory History Before *New Jersey v. Delaware I* and the Compact of 1905	2
B. *New Jersey v. Delaware I* And the Compact of 1905	5
C. Regulatory History Between the Compact and *New Jersey v. Delaware II*	7
D. *New Jersey v. Delaware II*	8
E. Regulatory History after *New Jersey v. Delaware II*	10
F. This Action	13
SUMMARY OF ARGUMENT	16
ARGUMENT	21
I. THE AUTHORITY CONFERRED BY ARTICLE VII OVER RIPARIAN IMPROVEMENTS IS BROAD AND EXCLUSIVE TO EACH STATE ON ITS SIDE OF THE RIVER	24
A. The Special Master Improperly Applied a Presumption Favoring Delaware	24
B. The Authority Conferred by Article VII Is Exclusive, Not Concurrent	27

TABLE OF CONTENTS—Continued

	Page
C. The Exclusive Riparian Authority in Article VII Gives Each State Full Regulatory Authority over Riparian Improvements on its Side	32
1. The Scope of Riparian Authority	32
2. Riparian Authority and the Police Power	36
3. Concurrent Jurisdiction and *Virginia v. Maryland*	41
II. POST-1905 ACTIONS BY THE PARTIES SUPPORT NEW JERSEY'S READING OF THE COMPACT	43
A. Actions By Delaware	44
B. Actions By New Jersey	47
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
Fertilizing Company v. Hyde Park, 97 U.S. 659 (1878)	41
Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)	38, 39
Illinois v. Kentucky, 500 U.S. 380 (1991)	48
Main Associates, Inc. v. B.&R. Enterprises, Inc., 181 A.2d 541 (N.J.Super. Ch.1962)	48
Massachusetts v. New York, 271 U.S. 65 (1926)	25
Miller v. Mendenhall, *43 Minn.* 95 (1890)	33
Mugler v. Kansas, 123 U.S. 623 (1887)	39
New Jersey v. Delaware, No. 1, Orig. (filed 1877)	25
New Jersey v. Delaware, 291 U.S. 361 (1934)	*passim*
New Jersey v. Delaware, 126 S. Ct. 2184 (2006)	13
New Jersey v. New York, 523 U.S. 767 (1998)	26, 48
O'Connor v. United States, 479 U.S. 27 (1986)	43
Palazzolo v. Rhode Island, 533 U.S. 606 (2001)	20, 39
Shively v. Bowlby, 152 U.S. 1 (1894)	33, 37
Texas v. New Mexico, 482 U.S. 124 (1987)	26
The Auger & Simon Silk Co. v. East Jersey Water Co., 96 A. 60 (N.J.E. & A. 1915)	40
United States v. Alaska, 521 U.S. 1 (1997)	13, 24
United States v. Cherokee Nation, 480 U.S. 700 (1987)	13, 24
Virginia v. Maryland, 540 U.S. 56 (2003)	*passim*
Yates v. City of Milwaukee, 77 U.S. 497 (1870)	19, 37

STATUTES AND LAWS	
16 U.S.C. § 1452(4),(5)	49
16 U.S.C. § 1456(e)	49
28 U.S.C. § 1251(a)	1
Act of January 24, 1907, ch. 394, 34 Stat. 858 (1907)	1, 7

TABLE OF AUTHORITIES—Continued

	Page
Waterfront Development Law, N.J. Stat. Ann. §§12:5-1	8
1851 N.J. Laws p. 335	3, 29
1854 N.J. Laws ch. 143	4
1855 N.J. Laws ch. 109	4
1864 N.J. Laws ch. 391	3
1869 N.J. Laws ch. 383	3, 38
1870 N.J. Laws ch. 131	4
1870 N.J. Laws ch. 344	4
1871 N.J. Laws ch. 256	3
1871 N.J. Laws ch. 307	4
1872 N.J. Laws p. 115	5
1876 N.J. Laws p. 418	5
1891 N.J. Laws ch. 123	4
1903 N.J. Laws ch. 243	7
1905 N.J. Laws ch. 42	7
1914 N.J. Laws ch. 123	8
1917 N.J. Laws ch. 189	8
23 Del. Laws ch. 5	7
58 Del. Laws ch. 5	11

OTHER AUTHORITIES

1867 NJ AG Op.	38
1954 NJ AG Op. No. 3	47
1 Henry Philip Farnham, *The Law of Waters and Water Rights* (1904)	*passim*
Black's Law Dictionary (8th ed. 2004)	2
Webster's Unabridged Dictionary (1898)	34

IN THE

Supreme Court of the United States

No. 134, Original

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

EXCEPTIONS BY NEW JERSEY TO THE REPORT OF THE SPECIAL MASTER AND SUPPORTING BRIEF

JURISDICTION

The original and exclusive jurisdiction of this Court rests upon Article III, section 2, of the United States Constitution and upon 28 U.S.C. § 1251(a).

STATUTORY PROVISION INVOLVED

The 1905 Compact between New Jersey and Delaware was ratified by Congress on January 24, 1907. *See* Act of January 24, 1907, ch. 394, 34 Stat. 858 (1907). Article VII of the Compact provides:

> "Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States."

STATEMENT

This case arises out of recent efforts by Delaware to block construction of a pier for unloading liquefied natural gas from vessels on the New Jersey side of the Delaware River. Although the pier would extend outshore of the low-water mark,[1] and thus past the New Jersey-Delaware boundary line, both New Jersey and Delaware agree that Article VII of the 1905 Compact between the States—an agreement entered into thirty years before the boundary was known—controls whether Delaware has regulatory authority over riparian projects on the New Jersey shore. Article VII provides that "[e]ach State may, on its own side of the river, continue to" exercise sovereign authority over "riparian" matters: that is, it may continue to "exercise riparian jurisdiction of every kind and nature," and it may continue to "make grants, leases, and conveyances of riparian lands and rights under [its] laws . . . ." In our view, that broad grant of authority gives New Jersey full authority to determine what riparian projects are constructed on its side of the river and, as a necessary corollary, bars Delaware from using its own sovereign powers to impede the exercise of that authority.

A. Regulatory History Before *New Jersey v. Delaware I* and the Compact of 1905

Although New Jersey and Delaware quarreled about the boundary between the two States almost from the beginning of statehood, *see New Jersey v. Delaware*, 291 U.S. 361, 376 (1934) (*New Jersey v. Delaware II*), that ongoing dispute actually had little effect on the States' authority to define and regulate the "riparian" rights of their citizens, at least with respect to the building and operation of riparian structures like piers and wharves. Prior to 1905, New Jersey had exer-

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[1] The "low-water mark" of a river is defined as "the point to which the water recedes at its lowest stage." Black's Law Dictionary 1623 (8th ed. 2004).

cised complete dominion over riparian improvements on the New Jersey shore, including on the Delaware River within the Twelve-Mile Circle.[2] Thus, in 1851, the New Jersey Legislature adopted the Wharf Act, 1851 N.J. Laws p. 335, which provided that an owner of riparian lands could "build docks, wharves, and piers in front of his lands, beyond the limits of ordinary low water," so long as the structures did not interfere with navigation and the owner had obtained a license "for that purpose." NJ App. 206a-210a. In 1864, the Legislature established the Board of Riparian Commissioners and authorized it to set pierhead and bulkhead lines in the Hudson River. NJ App. 217a-219a (1864 N.J. Laws ch. 391, saved from repeal at N.J. Stat. Ann. § 12:3-1). In 1869, the Legislature prohibited filling underwater lands and building structures outshore of the lines established by the Board. NJ App. 232a-239a (1869 N.J. Laws ch. 383, § 3, codified as N.J. Stat. Ann. § 12:3-3).

New Jersey expanded the Board's authority in 1871 to include all tidal waters outshore of the State's mean high-water line, also delegating to the Board the authority to approve grants and leases of underwater lands outshore of that line. NJ App. 242a (1871 N.J. Laws ch. 256, now codified as N.J. Stat. Ann. §12:3-10). As a result, in 1877 the Board adopted pierhead and bulkhead lines for a portion of the Delaware River within the Twelve-Mile Circle, outshore of Gloucester and Salem Counties. NJ App. 1197a, 1207a (Castagna Report, Figure 1 (*New Jersey v. Delaware II*, Plaintiff's Exh.144)). In 1891, New Jersey enacted legisla-

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[2] The Twelve-Mile Circle refers to an area encompassed by a circle centered at New Castle, Delaware, that was the subject of a conveyance from the Duke of York to William Penn in 1682. *See New Jersey v. Delaware II*, 291 U.S. at 364. The Twelve-Mile Circle intersects the eastern bank of the Delaware River so that the boundaries of six New Jersey municipalities are all or partially at the mean low-water line of the river.

tion that prohibited dredging under tidal waters without a license from the State, but provided that owners of State grants or leases had the right to dredge a channel from the area granted to them out to the main channel. NJ App. 249a-253a (1891 N.J. Laws ch.123, § 1, now codified as N.J. Stat. Ann. § 12:3-21).

These general enactments were complemented by specific grants to riparian owners. In 1854, for example, the New Jersey Legislature allowed Thomas D. Broadway to extend docks, piers or wharves into the Delaware River from the shoreline of what is now Pennsville Township, Salem County, "a sufficient distance for the accommodation of vessels navigating the said river," but not "so far into the said river as to injure or impede the navigation of same." NJ App. 211a (1854 N.J. Laws ch.143). Through subsequent legislation adopted in 1855, 1870, and 1871, the New Jersey Legislature similarly allowed other persons to build improvements within the Delaware River and Twelve-Mile Circle, outshore of the low-water line. NJ App. 214a-215a (1855 N.J. Laws ch.109 (Pennsgrove Pier Co.)); NJ App. 240a (1870 N.J. Laws ch.131 (Robert Walker)); NJ App. 241a (1870 N.J. Laws ch. 344 (Joseph Guest)); NJ App. 243a-244a (1871 N.J. Laws ch. 307 (Henry Barber)). In 1883, the Board of Riparian Commissioners (which had by then assumed the grant-making authority) granted submerged tidal lands within the Twelve-Mile Circle in the Delaware River to Daniel Kent, NJ App. 386a-391a, and, in 1891, the Board granted such lands to E. I. DuPont de Nemours ("Dupont"), NJ App. 399a-403a, and to Annie Brown. NJ App. 392a-398a. The Kent, Dupont, and Brown grants all referred to pierhead and bulkhead lines previously established by the Board as part of its ongoing responsibility to protect navigation. *See* NJ App. 1193a; 373a-374a (Castagna Report; Castagna Aff.). Those lines were necessarily located well outshore of low water, to allow vessels to travel between the piers and navigational channel. NJ App. 1198a (Castagna Report).

At this time, Delaware played no role in the approval or regulation of riparian improvements on the New Jersey side. Even on its own side, Delaware exerted little legislative or regulatory control over riparian improvements, leaving matters mostly to be resolved under common law.

B. *New Jersey v. Delaware I* And the Compact of 1905

The first original action between New Jersey and Delaware arose over fishing rights in the Delaware River, not over the erection of riparian improvements like piers and wharves. Delaware had enacted a law in 1872 prohibiting New Jersey fishermen from fishing in waters claimed by Delaware, unless they obtained a Delaware license. That action provoked New Jersey's Governor to issue a public notice and proclamation asserting that New Jersey had jurisdiction over the eastern half of the Delaware River and that the business of fishing in that area had always been conducted without interference by Delaware. NJ App. 245a-246a (1872 N.J. Laws p. 115). In 1876, the New Jersey Legislature adopted a Resolution stating that New Jersey had always claimed to own the eastern bed of the Delaware River, and that it was entitled to "exclusive jurisdiction" over that half of the river. NJ App. 247a-248a (1876 N.J. Laws p. 418) (*New Jersey v. Delaware II*, Plaintiff's Exh. 161, p. 24).

Efforts to resolve the dispute were not successful, and in 1877 New Jersey filed an original action against Delaware in this Court. *See* Bill of Complaint in *New Jersey v. Delaware*, Original No. 1 (*New Jersey v. Delaware I*) (Del. App. 20). In its Complaint, New Jersey asserted jurisdiction to the middle of the Delaware River, and sought to enjoin Delaware from arresting New Jersey residents or seizing New Jersey property in the river. Del. App. 20-54. The Complaint specifically referred to improvements—which included wharves, docks, and piers—extending from New Jersey's shoreline into the river, all of which had been constructed without interference by Delaware. Del. App. 36.

The Court responded promptly. In the same year that New Jersey filed its Complaint, the Court issued a preliminary injunction that restrained Delaware from imposing any tax or license fee on any New Jersey citizen or resident fishing in the Delaware River. NJ App. 99a-101a. The Order contained a specific finding that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . ," NJ App. 100a, further noting that its citizens had freely fished in the river "during said period." NJ App. 100a. It then went on to find that Delaware "has interfered with and claimed to control the right of fishing thereon . . . ." NJ App. 100a. It enjoined Delaware from requiring New Jersey citizens to get a license for what they "have heretofore been accustomed to do." NJ App. 101a.

Despite its fast start, the case then lingered until 1901 when, at the insistence of the Court, Delaware finally filed its Answer. Del. App. 95-162. In the Answer, Delaware did not deny the existence of improvements extending from the New Jersey shoreline into the river or assert that it had exercised jurisdiction over their construction. Del. App. 117. Then, before a Commissioner appointed to hear the action, New Jersey presented evidence about grants of underwater lands by its Board of Riparian Commissioners within the Twelve-Mile Circle. NJ App. 74a-92a. New Jersey's witnesses also testified about existing improvements on the New Jersey shoreline within the Twelve-Mile Circle that extended to deep water, NJ App. 38a-39a, including a pier at Finn's Point, NJ App. 51a, new and old steamboat wharves at Pennsville, NJ App. 53a, and a wharf in front of French's Hotel, in what is now Penns Grove Township, that extended 400 to 600 feet into the Delaware River. NJ App. 54a. Additional testimony showed that, as of 1903, the New Jersey Board of Riparian Commissioners had established pierhead and bulkhead lines

outshore of all of Salem County and Gloucester County, New Jersey, within the Twelve-Mile Circle. NJ App. 81a-87a.

Both States appointed Commissioners in an attempt to resolve the lawsuit. The Commissioners met in 1903 and reached agreement on what eventually became the Compact of 1905. The New Jersey Legislature first ratified the Compact on April 8, 1903, NJ App. 256a-261a (1903 N.J. Laws ch. 243), after a report from the New Jersey Commissioners, NJ App. 102a-104a, stating that, while the exact geographical boundary still remained unsettled, "nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time." NJ App. 103a. However, the Delaware Legislature did not adopt the Compact at that time. In a letter to the New Jersey Commissioners, the Delaware Commissioners explained that the legislation had failed, based on the view in Delaware that it would "surrender directly or indirectly . . . the title and jurisdiction which the State of Delaware claims to and over the soil and waters of the Delaware River within the twelve mile circle." NJ App. 105a-106a.

Delaware eventually receded from its opposition, and the Commissioners once more agreed on the terms of the Compact. Del. App. 1-8. The Delaware Legislature ratified the Compact on March 20, 1905, and the New Jersey Legislature followed suit the next day. 23 Del. Laws ch. 5 (1905), NJ App. 6a-13a; 1905 N.J. Laws ch. 42, NJ App. 262a-267a. Congress approved the Compact in 1907. *See* Act of Jan. 24, 1907, Ch. 394, 34 Stat. 858 (1907) (Del. App. 11a-14a).

C. Regulatory History Between the Compact and *New Jersey v. Delaware II*

After the Compact was adopted, New Jersey continued to exercise full jurisdiction over improvements appurtenant to

its shoreline within the Twelve-Mile Circle, again without interference by Delaware. In 1914, the New Jersey Legislature adopted the Waterfront Development Law, N.J. Stat. Ann. §§ 12:5-1 *et seq.* (1914 N.J. Laws ch. 123), NJ App. 283a-289a, which, among other things, required any person proposing a waterfront development such as a dock, wharf, or pier, to obtain approval from the newly-created New Jersey Harbor Commission, N.J. Stat. Ann. § 12:5-3, and declared any structure erected without approval to be "a public nuisance." N.J. Stat. Ann. § 12:5-6 (NJ App. 287a). Moreover, New Jersey continued its practice of conveying underwater lands outshore of mean low water within the Twelve-Mile Circle. For example, in 1917, the New Jersey Legislature granted to the United States jurisdiction and title over lands in the Delaware River, although it retained sovereignty and jurisdiction to serve civil and criminal process. NJ App. 298a-301a (1917 N.J. Laws ch. 189). In addition, between 1916 and 1930, New Jersey conveyed or leased underwater lands outshore of low water within the Twelve-Mile Circle to more than a dozen individuals and businesses, *see* NJ App. 404a-485a, with grants that extended hundreds of feet outshore of low water. *See, e.g.*, NJ App. 404a-411a, 427a, 438a, 457a-462a.

D. *New Jersey v. Delaware II*

In 1929, following a dispute over oyster beds in the Delaware Bay, New Jersey filed a second original action against Delaware, in which New Jersey alleged that, within the Delaware River and Bay, the New Jersey-Delaware boundary was located at the middle of the navigational channel. Del. App. 202-203. In response, Delaware alleged that, within the Twelve-Mile Circle, the boundary was located at the mean low-water line on the New Jersey side, and that, below the Twelve-Mile Circle, the boundary was located at the geographic middle of the Delaware River and Bay. Del. App. 218. *See also New Jersey v. Delaware II*, 291 U.S. at 363-64.

To support its position on the boundary within the Twelve-Mile Circle, New Jersey argued that, since 1854, it had conveyed underwater lands extending outshore of the mean low-water line without objection from Delaware and that the granted underwater lands now contained valuable improvements, including some on granted lands purchased by Delaware citizens. NJ App. 136a. In response, Delaware contended that the grants and improvements did not conflict with the boundary claimed by Delaware, because "[r]iparian rights of the New Jersey side of the river were recognized by the Compact of 1905." NJ App. 123a. In addition, Delaware stated that "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." NJ App. 123a. Then, at oral argument before the Special Master, Delaware counsel asserted that "the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do." NJ App. 126a-1. While the Special Master ultimately sided with Delaware on the boundary issue, he found that, under the Compact, Delaware had "recognized the rights of riparian owners to wharf out on the easterly side . . . within the twelve-mile circle" (NJ App. 131a) and recommended that, within the Twelve-Mile Circle, "the river and the subaqueous soil thereof shall be adjudged to belong to the State of Delaware, subject to the Compact of 1905." NJ App. 132a.

Excepting to the Special Master's report, New Jersey continued to argue that the boundary should be in the middle of the channel, based in part on its longstanding activities within the Twelve-Mile Circle. NJ App. 136a. In reply, Delaware advised the Court that it had "never questioned the right of citizens of New Jersey to wharf out to navigable water," and

represented that such a right could not "be questioned now because it is clearly protected by the Compact of 1905 between the States." NJ App. 139a. Moreover, Delaware reassured the Court that a boundary at the low-water line within the Twelve-Mile Circle would neither destroy nor seriously prejudice the rights of New Jersey's riparian owners, because the Compact of 1905 "recognized the rights of riparian owners in the river to wharf out, and the Master so found." NJ App. 140a. Delaware stated that, through the Compact of 1905, it had "recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water" and that this right "had never been questioned." NJ App. 141a. The Court followed the recommendations of the Special Master and set the New Jersey-Delaware boundary within the Twelve-Mile Circle at the mean low-water line on the New Jersey side, "subject to the Compact of 1905." *New Jersey v. Delaware II*, 291 U.S. at 385; *see also* NJ App. 23a (Decree) (boundary determination "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states").[3]

E. Regulatory History after *New Jersey v. Delaware II*

For at least several decades, the decision in *New Jersey v. Delaware II* had little impact on the regulation of riparian improvements in New Jersey. During that period, New Jersey carried on its customary practice of conveying underwater lands outshore of low water within the Twelve-Mile Circle, without objection by Delaware. *See* NJ App. 554a-588a. In addition, New Jersey continued to regulate the construction of improvements on underwater lands outshore of mean low

[3] The language in the decree referring to the Compact of 1905 reflected an agreement by the Attorneys General of Delaware and New Jersey, NJ App. 195a, reached in part "for protection of many Delaware corporations who have acquired wharfage rights in New Jersey." NJ App. 184a.

water and within the Twelve-Mile Circle. *See, e.g.*, NJ App. 664a-669a (DuPont project).

Eventually, however, Delaware began a gradual process of claiming authority to regulate riparian improvements on the New Jersey side, particularly after Delaware adopted its Coastal Zone Act in 1971. 58 Del. Laws ch. 175 (1971). That year, in conjunction with plans by Dupont to build a tanker unloading and storage facility at its Chambers Works Plant in Deepwater, New Jersey, Delaware attempted to lease to Dupont underwater lands that New Jersey previously had granted to Dupont in 1916. NJ App. 1300a-1301a. Dupont objected, however, asserting that "the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands; and that the subsequent Supreme Court cases did not, and in fact could not, modify the terms of said Treaty." NJ App. 648a. In the face of Dupont's objection, Delaware agreed to defer collection of lease payments until the question was resolved, NJ App. 649a, and issued a lease to Dupont providing that it was "without prejudice to the title claim of either party." NJ App. 651a. There is no evidence that Dupont has made any lease payments to Delaware. NJ App. 1161a, ¶ 195.

Delaware did ultimately come to play a more direct role in regulating other projects on the New Jersey side. For example, in 1991, Delaware issued a permit, as well as a lease of submerged lands, for a coal unloading facility to be constructed by Keystone Congeneration Systems, extending from the New Jersey shoreline. *See* NJ App. 1163, ¶ 207. Then, five years later, Delaware and the New Jersey Division of Parks and Forestry entered into a subaqueous land lease, related to the rehabilitation of an historic pier and a new floating ferry dock outshore of mean low water, near a New Jersey State Park (Fort Mott) in Salem County, New Jersey

and a Delaware State Park. NJ App. 1163a-1164a, ¶¶ 208-209. And, in 2005, Delaware entered into a subaqueous lands lease with Fenwick Commons, LLC, related to the construction of a 750-foot pier extending from the New Jersey shoreline of Penns Grove, Salem County, New Jersey into the Delaware River within the Twelve-Mile Circle. NJ App. 1164a, ¶¶ 210, 211.

New Jersey also released a 1979 report entitled "Options for New Jersey's Developed Coast," addressing management of waterfront areas, including the Delaware River waterfront, within the Twelve-Mile Circle. NJ App. 1053a-1056a. The report stated, among other things, that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey." NJ App. 1053a. It contained no reference, however, to the Compact of 1905. In addition, New Jersey promulgated an extensive Coastal Zone Management Plan in 1980, *see* NJ App. 1057a-1063a, that acknowledged the potential for conflict between New Jersey and Delaware within the Twelve-Mile Circle and stated that a New Jersey project extending from the New Jersey shoreline into Delaware territory would require permits from both states. NJ App. 1065a. The Coastal Zone Management Plan likewise made no mention of the 1905 Compact.

The relatively harmonious relations between the States changed course in 2005 after Delaware denied an application by Crown Landing, LLC, for a coastal zone approval, advising Crown Landing that its proposed pier and associated onshore liquefied natural gas facility on the New Jersey side of the river was "prohibited" under Delaware's Coastal Zone Act. NJ App. 1164a, ¶¶ 212, 213. After Delaware purported to block this project, New Jersey sought to resolve the matter by calling Delaware's attention to Article VII of the 1905 Compact. NJ App. 1109a-1111a. In addition, the New Jersey Assembly passed a Resolution asking Delaware to amend its

laws to make clear that those laws were subject to the 1905 Compact. NJ App. 1114a-1116a. These efforts were unsuccessful, NJ App. 1112a-1113a, and this action followed.

F. This Action

New Jersey filed the present action in 2005, seeking to reopen the 1935 Decree in *New Jersey v. Delaware II* or, alternatively, to file a new Bill of Complaint. This Court denied the motion to reopen, but granted leave to file the Complaint. It then appointed Ralph I. Lancaster, Jr., as Special Master and authorized him to conduct additional proceedings. *See New Jersey v. Delaware*, 126 S. Ct. 1184 (2006).

The Special Master submitted his report on April 12, 2007, concluding that Article VII of the 1905 Compact, while granting New Jersey certain riparian authority, nonetheless allowed Delaware to exercise jurisdiction over riparian projects, such as the Crown Landing facility, on the New Jersey shore. He stated that "[b]ecause Delaware owns the land and water up to the low water mark, the starting presumption is that Delaware, as the sovereign State, has jurisdiction over its own land." Report at 34. That presumption was then reinforced by "'a strong presumption' against defeat of a State's title." Report at 42 (quoting *United States v. Alaska*, 521 U.S. 1, 34 (1997) (further internal quotation marks omitted)). The Special Master thus determined that "'a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms.'" Report at 43 (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)).

Turning to the specific provisions of Article VII, the Special Master first rejected Delaware's argument that the phrase "on its own side of the river" meant that any authority conferred by Article VII was subject to—and thus, in New Jersey's case, curtailed by—the later establishment of the boundary at the low-water mark on the New Jersey side.

Report at 35-40. Pointing out that "New Jersey had a long history of making land grants along its shore, setting boundaries, adopting pierhead and bulkhead lines, and the like," Report at 37, the Special Master reasoned that "[h]ad the States intended that the resolution of the boundary render Article VII void, they would have said so in clearer terms." Report at 37. He also noted that Delaware's argument was "belied by the language of Article IX" of the Compact declaring that the Compact was "'binding in perpetuity upon both of said states.'" Report at 38.

The Special Master then addressed the clause in Article VII providing that each State "may continue to . . . make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." Report at 40-52. According to the Special Master, pursuant to that language, New Jersey's authority to grant riparian lands was significantly more circumscribed than its authority to grant riparian rights. As to riparian lands, he found that the presumption against surrender of title, as well as language in Article VIII of the Compact, meant that "[t]he Compact preserves for New Jersey the authority to make grants of riparian *lands* down only to the low water mark on the New Jersey shore." Report at 51; *see also* Report at 99-100. By contrast, the Special Master concluded that, as to riparian rights, "the Compact preserves for New Jersey the authority to make grants of riparian *rights* outshore of the low water mark under New Jersey's law of riparian rights, including the right to construct wharves and other improvements extending to navigable waters flowing over subaqueous soil owned by Delaware." Report at 51-52. The Special Master stressed, however, that this "preserved authority under Article VII of the Compact to make grants of 'riparian rights,' including the right to build wharves or to authorize private landowners on its shores to do the same, is subject to reasonable regulation by the State." Report at 51.

Turning to the clause in Article VII providing that each State "may continue to exercise riparian jurisdiction of every kind and nature," Report at 52-86, the Special Master found that it was of relatively narrow scope. As he saw it, "historically, the authority to exercise riparian rights has been viewed as separate from—and subservient to—a State's general regulatory law." Report at 56. He thus went on to conclude that "[t]he phrase 'riparian jurisdiction' fairly can be read only to mean the authority of each State, on its own side of the River, to establish and oversee the riparian rights associated with land appurtenant to the River, under its own laws," Report at 57, not as a "confirmation of broader police powers to regulate all activities that might be conducted on riparian improvements even to the extent those improvements cross the boundary line." Report at 57. In addition, the Special Master found that the riparian jurisdiction conferred by Article VII was not "exclusive" (Report at 61-68, 99-100)—at least on the New Jersey side—saying that "there is nothing in the language of the Compact suggesting that such jurisdiction would be exclusive for improvements straddling the boundary line." Report at 62. He supported his reading by relying on evidence of recent regulatory dealings between the States, Report at 68-84, stating that New Jersey had explicitly and implicitly "recogn[ized] . . . Delaware's right to regulate projects on and outward from New Jersey's shore." Report at 78.

The Special Master thus determined that the States had concurrent jurisdiction over improvements on the New Jersey shore that extended into Delaware territory. Report at 86, 99-100. He acknowledged that this Court had recently rejected the idea of such concurrent jurisdiction in *Virginia v. Maryland*, 540 U.S. 56 (2003), holding there that Maryland could not exercise regulatory authority over riparian projects on the Virginia side of the Potomac River, even if they crossed into Maryland territory (*i.e.*, past the low-water mark on the

Virginia side).[4] Report at 64-65 n.118. He declined to follow that decision, however, finding it distinguishable because of "the unique language of the compact and arbitration award involved in that case." Report at 64 n.118.[5]

SUMMARY OF ARGUMENT

Our position in this case is straightforward: that Article VII of the 1905 Compact between New Jersey and Delaware gives each State complete regulatory authority over the construction and operation of riparian improvements on its shores, even if the improvements extend past the low-water mark. By its plain terms, Article VII confers full authority on each State to make grants of "riparian rights," to make grants of "riparian lands," and to "exercise riparian jurisdiction of every kind and nature" on its side of the river. Taken together, and understood in historical context, those grants of authority, at a minimum, include the exclusive authority to decide whether owners of riparian land may construct piers and wharves extending past the low-water mark for the loading and unloading of goods. And, while Delaware unquestionably can exercise its police power outshore of the low-water mark, it cannot do so in a manner that would interfere with the riparian authority expressly granted to New Jersey in Article VII. The Special Master's conclusion to the contrary, therefore, was in error.

I. A. The Special Master got off on the wrong foot by employing a heavy presumption in Delaware's favor. According to the Special Master, because Delaware owns the sub-

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[4] Special Master Lancaster was also the Special Master in *Virginia v. Maryland*.

[5] The Special Master also determined that Delaware was not judicially estopped from challenging New Jersey's interpretation of Article VII. Report at 86-92, and that Delaware had not lost jurisdiction through prescription and acquiescence. Report at 92-99. New Jersey is not excepting to those conclusions.

merged lands outshore of the low-water mark on the New Jersey side of the river, *see New Jersey v. Delaware*, 291 U.S. 361 (1934), he was obliged to apply a "strong presumption against defeat of a State's title," Report at 42 (internal quotation marks omitted), one that required any surrender of Delaware's territorial jurisdiction to be made in "unmistakable terms." Report at 43 (internal quotation marks omitted). But this approach is plainly incorrect: this Court has recently held that the presumption against defeat of title is *not* applicable to the construction of Compacts entered into when title was unsettled, *see Virginia v. Maryland*, 540 U.S. 56, 67-69 (2003), as is the case here. Article VII thus must be read according to its terms, not in light of a predetermined bias toward Delaware.

If Article VII is looked at without the distorting presumption, it is first evident that Article VII grants exclusive—not concurrent—riparian authority to each State on its side of the river: that is, it gives only one State authority to grant riparian lands and rights and to exercise riparian jurisdiction on each side. Although the Special Master found that New Jersey merely had non-exclusive "riparian jurisdiction" past the low-water mark on its side—and no authority at all to grant "riparian lands" beyond that point—Article VII provides no textual basis for this patchwork of regulatory authority. Nothing in Article VII says that Delaware will have any kind of riparian authority on the New Jersey side of the river; it states only that Delaware (like New Jersey) will have authority "on its own side of the river." Furthermore, Article VII specifies that each State is to have specific authority to make grants of riparian lands and rights under the laws of the granting State, which on the New Jersey side is New Jersey.

That this authority is exclusive is reinforced by the language in Article VII providing that each State "may continue to" exercise its riparian jurisdiction and make grants of riparian lands and rights. There is no question that, prior to the

time of the Compact, New Jersey alone had regulated the construction and operation of riparian improvements on its shores, including those that extended past the low-water mark. Thus, New Jersey had enacted statutes governing the right to right to erect piers and wharves as early as 1851, and it had granted numerous approvals and interests in submerged lands, including lands outshore of the low-water mark, so that those piers and wharves could be built. By contrast, Delaware had neither exerted nor claimed any regulatory authority over riparian improvements on the New Jersey side.

Although the Special Master placed emphasis on the fact that Article VII does not contain the word "exclusive," that omission is of little significance. Article VII expressly confers "riparian jurisdiction of every kind and nature," and that language is more than enough to foreclose another State from exercising "riparian jurisdiction" on the same side of the river. And, of course, the riparian jurisdiction exercised by New Jersey in the past—the jurisdiction that Article VII allows New Jersey to "continue to exercise"—*was* exclusive on its shores. The jurisdiction conferred by Article VII thus is exclusive to each State, not shared between them.

B. The riparian authority conferred on New Jersey by Article VII is not only exclusive, but broad in nature. At the very least, it encompasses full authority to decide what riparian improvements may be constructed on the New Jersey shore, regardless of whether the improvements extend past the low-water mark. As of 1905, it was well-understood that state law defined the rights of riparian owners, *see Shively v. Bowlby*, 152 U.S. 1, 40-47 (1894), and one prominent right in New Jersey and most other States was the "right to erect wharves to reach the navigable portion of the stream." 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 62, at 279 (1904). Indeed, recognition of that right was considered "a necessity if commerce is to be carried on by water." Farnham, § 111, at 520.

To enable the piers and wharves to extend into navigable water, however, the States had to grant the necessary interests in submerged lands beyond the low-water mark. New Jersey had recognized that riparian owners could wharf out past the low-water mark well before 1905, and it had long been granting the appropriate interests in land to do so, first by specific legislation and then by grants from the Board of Riparian Commissioners. Against this background, New Jersey's express Article VII authority to "continue to" grant riparian rights and lands necessarily would have included the authority to grant riparian rights and lands *beyond* the low-water mark, not just up to it. If Article VII had provided for anything less, in fact, it would have been dramatically curtailing New Jersey's ability to advance its important commercial interests.

The Special Master nevertheless concluded that Delaware could regulate (and, apparently, even veto) riparian improvements on the New Jersey side, saying that, whatever riparian authority Article VII had granted to New Jersey, it had left Delaware free to exercise its "separate" police power. Report at 56. But this theory rests upon a fundamental misconception: a State's authority to define riparian rights is *not* "separate" from its police power, but inextricably linked to it. As this Court long ago noted, "among those rights [of the riparian owner] [is] . . . the right to make a landing, wharf or pier for his own use or the use of the public, *subject to* such general rules and regulations as the legislature may see proper to impose for the protection of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. 497, 504 (1870); *see also* Farnham § 64b, at 290 ("the limit of the private right is imposed by the public right"). In determining the extent of riparian rights, therefore, or in exercising its riparian jurisdiction, a State inevitably must measure the extent of the private landowner's interest against the public interest protected by its police power.

A State's general power to define riparian rights likewise includes the power to determine what the permissible *use* of wharves and piers might be. A State's authority to restrict the permissible uses of property is part and parcel of its obligation to specify the scope of state property rights, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), and a State's grant of the right to build a pier or wharf would typically carry with it the right to use that structure for its intended purpose: the docking of vessels in order to load and unload goods. And, while the Special Master apparently believed that Delaware could decide *what* goods are suitable for unloading, it is extremely doubtful that the drafters of the Compact, well aware of the importance of piers and wharves to economic progress, would have given Delaware the power to choose those goods that could, and could not, be unloaded from vessels on the New Jersey shore.

The riparian authority given to New Jersey by Article VII, while broad, does not preclude Delaware from all exercise of its police power on the eastern half of the river: it simply prevents Delaware from using that power to interfere with New Jersey's riparian authority. Although Delaware claims that, despite New Jersey's authority over riparian matters, it can trump that authority with respect to riparian structures beyond the low-water mark, this Court rejected just such a sweeping assertion of police power in *Virginia v. Maryland*, 540 U.S. at 72, holding that Maryland could not exercise its sovereign authority to interfere with riparian improvements on the Virginia shore. Here, contrary to the view of the Special Master, *see* Report at 64-65 n.118, the language of the 1905 Compact is even more unequivocal that each State has full riparian authority on its shores, speaking directly to the extent of the respective States' *sovereign* authority over riparian rights. New Jersey thus can exercise full control over riparian improvements on the New Jersey side of the river.

II. Post-Compact actions by the States do not support Delaware's view of Article VII. Although the Special Master placed considerable emphasis on such actions, he erred by failing to distinguish between actions taken with direct knowledge of the Compact and those taken with no apparent awareness of the Compact at all, much less of the specific provisions of Article VII dealing with riparian authority. The Special Master thus paid little attention to numerous representations by Delaware in *New Jersey v. Delaware II* about the broad scope of New Jersey's riparian authority under the Compact—representations that included, among other things, the opinion of its counsel that "the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of [wharves on its side] and to say who shall erect them." NJ App. 126a-1. Similarly, the Special Master mistakenly dismissed or disregarded other evidence showing that Delaware had specifically acknowledged New Jersey's rights under the Compact, while giving too much weight to actions by New Jersey that, although accepting some involvement by Delaware in the approval of New Jersey riparian projects, reveal no knowledge of the Compact at all. And, in any event, the handful of New Jersey actions ultimately relied on by the Special Master are far fewer than the comparable examples of "acquiescence" that this Court found to be insufficient in *Virginia v. Maryland*. *See* 540 U.S. at 63.

ARGUMENT

Article VII of the 1905 Compact between New Jersey and Delaware provides that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." Although Article VII, by its plain terms, appears to grant equal and uniform regulatory authority to each State, the Special Master instead interpreted it to confer a patchwork of regulatory authority on the New Jersey (but not

Delaware) side of the river, assigning authority to each State depending on what power is at issue and where it is being exercised. Erroneously applying a presumption against defeat of a State's title, *see Virginia v. Maryland*, 540 U.S. 56, 67-69 (2003) (presumption inapplicable where boundary disputed), the Special Master concluded that New Jersey has the authority to grant riparian *rights* past the low-water mark on its side, but no authority to grant riparian *lands* past that mark, even though the text of Article VII treats those two powers exactly the same. In addition, the Special Master decided that, while New Jersey can exercise riparian *jurisdiction* beyond the low-water mark, its authority to do so is not exclusive: that is, Delaware not only has concurrent jurisdiction on the New Jersey side, but can block New Jersey-approved riparian projects by the exercise of its "separate" police power.

Neither the language of Article VII nor its historical background provides any basis for this haphazard pattern of state regulatory authority. Rather, read as it was written, Article VII gives each State complete regulatory control over the construction of riparian improvements on its shores. *First*, Article VII confers three forms of riparian authority—to make grants of riparian rights, to make grants of riparian lands, and to exercise riparian jurisdiction—that are, by the straightforward terms of Article VII, exclusive to each State on "its own side of the river," not shared between them. *Second*, this "riparian" authority, understood in historical context, gives each State full power to approve the construction and operation of riparian structures (like piers and wharves) on its side of the river, and to grant the necessary riparian rights and lands to do so, even though those improvements extend past the low-water mark. *Third*, while Article VII does not deprive Delaware of all its police power on the eastern half of the river, it does bar Delaware from exercising its police power in a way that would undercut the riparian authority given to New Jersey. *See Virginia v. Maryland*, 540

U.S. at 69-72. For example, and of particular relevance here, it may not block the Crown Landing project that gave rise to this litigation.

Before turning to these issues, we note at the outset that the Special Master correctly rejected Delaware's principal argument with respect to Article VII: that it was merely a "stand-still" agreement pending final determination of the boundary between the two States. *See* Report at 35-40.[6] According to Delaware, New Jersey lost much of its authority to approve and regulate riparian improvements "on its own side of the river" as soon as this Court concluded that the boundary was at the low-water mark on the New Jersey side, *see New Jersey v. Delaware*, 291 U.S. 361 (1934), leaving New Jersey with no jurisdiction at all beyond that line. But as the Special Master noted, this argument is unpersuasive. Most obviously, it is flatly contrary to language in Article IX of the Compact, which specifies that, upon approval by both States and ratification by Congress, the Compact "shall become binding in perpetuity upon both of said States . . . ." That language clearly indicates that, whatever the boundary might turn out to be, the authority conferred by Article VII, as well as by other Articles of the Compact, was to remain in force.

In addition, as we discuss in more detail later, it is unquestioned that prior to 1905 New Jersey had a long history of making grants of riparian rights and lands, including grants that allowed riparian owners to erect wharves and piers beyond the low-water line, without any interference by Delaware. If the Compact had intended to make that custom subject to termination, either then or later, it is reasonable to expect that the Compact would simply have said so. Instead, Article VII says just the opposite: that each State "may . . .

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[6] We state our views on this point only briefly. If Delaware files exceptions to the Special Master's Report with regard to this issue, we will address it further in our reply.

continue to" exercise riparian jurisdiction and grant riparian lands and rights. Indeed, thirty years later, in *New Jersey v. Delaware II*, this Court expressly recognized that its boundary determination was "subject to the Compact of 1905," 291 U.S. at 385, not the other way around. That decision thus did not alter the scope of New Jersey's authority under the Compact.

I. THE AUTHORITY CONFERRED BY ARTICLE VII OVER RIPARIAN IMPROVEMENTS IS BROAD AND EXCLUSIVE TO EACH STATE ON ITS SIDE OF THE RIVER

A. The Special Master Improperly Applied a Presumption Favoring Delaware

In finding that Article VII gave New Jersey only piecemeal regulatory authority over riparian improvements on its side of the river, the Special Master made several critical errors. The first—and one that tainted much of the subsequent Report—was that he stacked the interpretative deck by reading Article VII through the perspective of "'a strong presumption against defeat of a State's title.'" Report at 42 (quoting *United States v. Alaska*, 521 U.S. 1, 34 (1997)). To implement that presumption, the Special Master declared that "'a waiver of sovereign immunity will not be implied, but instead must be surrendered *in unmistakable terms*.'" Report at 43 (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (emphasis added)). The Special Master then found that New Jersey's interpretation of the Compact was not sufficiently "unmistakable" to meet that exacting standard.

This Court has recently held, however, that the presumption against defeat of title is not applicable when a State's "title" is in dispute at the time of the relevant agreement. *See Virginia v. Maryland*, 540 U.S. at 67-69. In that case, Maryland had argued that the Court should apply the presumption against defeat of title in interpreting the 1785 Com-

pact between itself and Virginia, relying on the fact that Maryland had later been found to own the riverbed of the Potomac River up to the low-water mark on the Virginia side. *See* 540 U.S. at 67. The Court disagreed. While remarking that "Maryland is doubtless correct that if her sovereignty over the River was well settled as of 1785, we would apply a strong presumption against reading the Compact as stripping her authority to regulate activities on the River," 540 U.S. at 67 (citing *Massachusetts v. New York*, 271 U.S. 65, 89 (1926)), the Court noted that "the scope of Maryland's sovereignty over the River was in dispute both before and after the 1785 Compact." 540 U.S. at 68. Setting aside the presumption, therefore, the Court instead chose to "read the 1785 Compact in light of the ongoing dispute over sovereignty." 540 U.S. at 69.

The same uncertainty about title was present at the time of the Compact in this case. As of 1905, Delaware's title to submerged lands off the New Jersey shore, far from being accepted as fact by the parties, was being questioned in an ongoing lawsuit brought by New Jersey before this Court. *See New Jersey v. Delaware*, No. 1, Orig. (filed 1877), Del. App. 20-54. Indeed, for the States, a primary purpose of entering into the Compact was to establish common ground on various jurisdictional issues so that the litigation could be discontinued. *See* Report, App. B, Preamble (Commissioners appointed to reach an agreement "looking to the amicable termination of said suit between said States" and "the final adjustment of all controversies relating to . . . their respective rights in the Delaware River and Bay"). If each State had refused to give up its territorial rights as it then saw them, no resolution along the lines of the Compact would have been possible.

The Special Master failed to appreciate that fact because he looked at the Compact solely from Delaware's standpoint, treating the boundary line as though it had already been

established at the New Jersey low-water mark in 1905. But, at the relevant time, New Jersey had a completely different view, regarding the boundary as being in the middle of the channel. Thus, if Article VII were to be read in light of what each State *thought* that it had dominion over, it is evident that New Jersey would have been in exactly the same position that Delaware was, with each State believing that it owned the submerged lands between the low-water mark on the New Jersey side and the middle of the channel. Indeed, given the fact that New Jersey alone had previously regulated riparian improvements in the disputed area, *see* pages 28-30 *infra*, it would actually make more sense to presume that New Jersey would resist surrender of that exclusive authority than to presume that Delaware would insist on gaining part of it. In any event, however, a presumption that can work both ways at once is not a useful interpretive tool.

The misguided search for "unmistakability" also led the Special Master to misapply the terms of Article VIII of the Compact, which provides that "[n]othing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." Although the Special Master saw Article VIII as an additional hurdle for New Jersey to clear, *see* Report at 43 (saying that Article VIII was "consistent with" the presumption against surrender of jurisdiction), the broad grants of riparian authority *are* "expressly set forth" in Article VII, thus fully meeting the condition set forth in Article VIII. The Special Master evidently thought that the language of Article VII was not "express[]" *enough*, but that insistence on heightened clarity simply transports the "unmistakability" doctrine into the provisions of Article VIII, again employing it in circumstances where it does not belong. The text of Article VII should be read as it was written, without any predetermined bias in favor of Delaware. *See generally New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas v. New*

Mexico, 482 U.S. 124, 128 (1987) (a Compact is both a contract and a federal law to be construed according to its terms).

B. The Authority Conferred by Article VII Is Exclusive, Not Concurrent

If Article VII is read according to its terms, the first thing that becomes apparent is that Article VII is a grant of *exclusive* jurisdiction to each State on its side of the river, not a grant of shared jurisdiction. Although the Special Master found that New Jersey's Article VII authority was not exclusive—at least with respect to riparian improvements extending past the low-water mark—his reasoning jumped about according to the particular kind of riparian authority at issue. Thus, the Special Master decided that New Jersey had no authority whatsoever to grant riparian lands past the low-water mark, although it could grant riparian rights past that mark. Report at 52, 99. And, he then went on to find that New Jersey had only partial, non-exclusive riparian jurisdiction beyond the low-water mark. Report at 85-86, 99-100.

This multi-layered analysis, however, only illustrates the distortion that results from the out-of-place presumption against surrender of title. Looked at by itself, Article VII gives no hint that the three kinds of riparian authority conferred by its provisions are to stand on markedly different footing from one another. Indeed, as Article VII is written, the authority to make grants of riparian "lands" is clearly coequal to the authority to make grants of riparian "rights"—the relevant language provides without differentiation that "[e]ach State may . . . continue to . . . make grants, leases, and conveyances of riparian lands and rights"—and a finding that the former is territorially more limited than the latter is bereft of textual grounding. Similarly, there is no justification in the text for treating a State's "riparian jurisdiction" under Article VII as any more or less exclusive than its authority over "riparian lands and rights." Either all the powers conferred

by Article VII are shared by the two States, or none of them is.

The language of Article VII itself makes clear which view is correct: "each" State has exclusive riparian authority on its "own" side, including full authority to grant riparian rights and lands and to exercise riparian jurisdiction.[7] The basic principle of Article VII is that each State will have the authority to regulate riparian improvements that are built on its shores. Consequently, Article VII does not say, or even imply, that Delaware would have authority to grant riparian lands and rights or to exercise riparian jurisdiction on the New Jersey side, but rather declares that the riparian authority given to Delaware, like the riparian authority given to New Jersey, is confined to "its own side of the river." Moreover, the Article VII authority to make grants of riparian rights and lands expressly says that it is to be "under the laws" of the granting State. On the New Jersey side, that State is New Jersey.

This natural division of responsibility is then illuminated by the words "continue to," which introduce an important historical dimension to a State's authority to grant riparian rights and lands, as well as to exercise riparian jurisdiction. Those words plainly indicate that the Compact drafters expected the riparian authority formerly exercised by each State to carry forward into the future. Nor would the extent of that pre-existing authority have been open to question at the time: in 1905, it was absolutely clear that New Jersey—and New Jersey alone—had regulated the construction of riparian improvements on the New Jersey shore. Furthermore, in carrying out that responsibility, New Jersey had repeatedly authorized the erection of piers and wharves that extended beyond the low-water line.

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[7] We discuss *how much* regulatory power is encompassed by these grants of riparian authority in Subsection C *infra*.

That longstanding regulation by New Jersey had taken both general and specific forms. As a general matter, beginning as early as 1851, New Jersey had enacted statutes that granted riparian owners the right to construct improvements on New Jersey's shores, provided that they obtained a license, *see, e.g.*, 1851 N.J. Laws p. 335, and the later-established Board of Riparian Commissioners had adopted pier and bulkhead lines, applicable in the Delaware River within the Twelve-Mile Circle, setting the limits for the filling of underwater lands and for the building of piers. New Jersey had also granted specific authorizations for individual riparian owners to construct piers and wharves extending past the low-water mark within the Twelve-Mile Circle, both by specific legislative acts and through grants from the Board of Riparian Commissioners. As part of its grants, the State had specifically conveyed interests in the underlying lands outshore of the low-water mark as needed to construct the required facilities. *See* page 4 *supra*.

By contrast, Delaware had played no role whatsoever in the approval of riparian structures on the New Jersey shore. Indeed, Delaware had played only a modest part in regulating riparian improvements on its own shore. *See* Report at 69 ("there is little evidence of Delaware's active involvement in shoreland development prior to the mid-1900s on either its own shore or the New Jersey shore . . . ."). As the Special Master observed, "[a]t the time the States entered into the Compact in 1905, and continuing beyond the middle of the twentieth century, Delaware had no formal regulatory system in place governing riparian or coastal development." Report at 69. Instead, the scope of riparian improvements in Delaware was dictated largely by the terms of common law and "generally [was] limited only to the extent they constituted a public nuisance." Report at 69.

Nothing in Article VII suggests an intention to alter that pre-Compact practice, suddenly giving Delaware a previously

unknown authority to grant riparian rights and lands or to exercise riparian jurisdiction on the New Jersey side of the river. Indeed, that would have been an especially odd thing for the Compact drafters to have done: the stated purpose of the 1905 Compact was to resolve points of contention, not to incite new ones. *See* Report, App. B, Preamble.[8] Were the Special Master correct that Article VII provided only non-exclusive riparian authority to each State, Delaware presumably would have been free to exert its regulatory powers over New Jersey improvements even in 1905—at a time when New Jersey staunchly believed that its own territory reached to the middle of the channel—thereby provoking just the sort of jurisdictional controversy that the States were trying to resolve. And, any suggestion that Delaware's concurrent riparian authority was just lying dormant until the time of the boundary determination would be nothing more than a variation on Delaware's broad "standstill" argument, which the Special Master properly dismissed as unsupported.

To bolster his conclusion that New Jersey's riparian jurisdiction was not exclusive, the Special Master placed heavy reliance on the absence of the word "exclusive" in Article VII, pointing out that the word had been employed in other Articles of the 1905 Compact as well as in the 1834 Compact between New Jersey and New York. *See* Report at 61-68. But, even leaving aside that Article VII does not contain the word "concurrent" either, the significance of this omission is severely undercut by the fact that Article VII uses, with respect to "riparian jurisdiction," an equally, if not more, expansive phrase: "of every kind and nature." By any standard, riparian jurisdiction that can be overridden at will by another State does not fit that description. Furthermore, as we

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[8] This Court, in fact, had emphasized customary practices in its injunction against Delaware in *New Jersey v. Delaware I*, the litigation that the Compact was meant to settle. *See* page 6 *supra*.

have just shown, the riparian jurisdiction that New Jersey could "continue to exercise" under Article VII unquestionably had been "exclusive" in the most immediate sense: it was the *only* jurisdiction that had been exercised by either State on the New Jersey side of the river. There was no apparent reason for the parties to treat it as less "exclusive" in the future than it had been in the past.

For its part, Delaware has argued that Article VII cannot have ceded New Jersey exclusive jurisdiction because—given the unbalanced nature of their territorial claims—that would give New Jersey more out of Article VII than Delaware received. *See* Delaware SJ Motion at 34-35. But there is no rule of contract interpretation that requires (or, for that matter, even permits) the Court to equalize the burdens and benefits of a contractual provision between two States.[9] And, in any event, Delaware simply misapprehends the nature of the 1905 Compact. Looked at in its entirety, the Compact is not a "split the difference" agreement, but rather an agreement that, wherever possible, accords equal grants of jurisdiction to the parties *regardless of* their outstanding differences. Thus, for example, Article I gives New Jersey jurisdiction over crimes committed on the "eastern half" of the river and the authority to serve process up to the low-water mark on the Delaware side—a mirror image of the authority given to Delaware in Article II—even though that equal allocation of authority would also be regarded as unequal if viewed in light of the parties' boundary positions. Other Articles in the Compact likewise confer the identical degree of regulatory authority on each State, without adjusting the playing field to compensate for the more expansive territorial claim asserted by Delaware. *See, e.g.*, Report, App. B, Art. V (laws of each State "shall continue in force"); Report, App. B, Art. VI (nothing in

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[9] The record shows that the Delaware Legislature questioned the merits of the Compact, initially refusing to approve it. *See* page 7 *supra*. In the end, however, it accepted the Compact with only minor changes.

Compact shall affect the taking of oysters, etc. "under the laws of either State"). On the same principle, the riparian authority conferred by Article VII is exclusive to each State on its own side of the river.

C. The Exclusive Riparian Authority in Article VII Gives Each State Full Regulatory Authority over Riparian Improvements on its Side

1. *The Scope of Riparian Authority.* If New Jersey's riparian authority under Article VII is exclusive, the remaining question is whether that authority—specifically, the authority both to "make grants, leases, and conveyances of riparian lands and rights under [its] laws" and to "exercise riparian jurisdiction of every kind and nature"—nonetheless leaves room for Delaware to prohibit New Jersey riparian improvements through the exercise of its own "police power." In our view, it does not. Whatever the outer boundary of New Jersey's "riparian" authority may be, it encompasses, at a minimum, full authority to determine the nature and extent of riparian improvements (like wharves and piers) on its shores, including the authority to make the necessary grants of riparian rights and lands past the low-water mark. As a consequence, although Delaware retains much of its police power on the eastern half of the river, it cannot employ that power to interfere with the riparian authority granted to New Jersey by Article VII.

A proper interpretation of the Compact again requires historical context. Although the term "riparian rights" embraces a number of different rights associated with ownership of riparian land, *see* 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 62 (1904) (NJ App. 1280a), a State's authority over "riparian lands and rights" in 1905 would have encompassed, at the very least, complete authority to determine what riparian improvements—in particular, what piers

and wharves—could be built on its shores, even past the low-water mark. By then, it was firmly established that state law defined the rights of riparian owners, *see Shively v. Bowlby*, 152 U.S. 1, 40-47 (1894), and one widely acknowledged riparian right was the "right of access" to the water, which "include[d] the right to erect wharves to reach the navigable portion of the stream." Farnham § 62, at 279. The latter, in turn, "necessarily include[d] the right to fill in and build wharves and other structures in the shallow water in front of [the upland] *and below low-water mark*." Farnham, § 113, at 534, citing *Miller v. Mendenhall*, 43 Minn. 95, 97 (1890) (emphasis added).[10]

To exercise this riparian "right" to erect piers and wharves out to navigable water, therefore, riparian owners needed to obtain interests in submerged lands, which were usually owned by the State. This was not a serious practical problem, however, because most States were willing to grant the required land interests, recognizing that "[s]uch structures are . . . a necessity if commerce is to be carried on by water." Farnham § 111, at 520. The prevailing view was that "[t]he erection of wharves is for the advancement of the interests of commerce, and, therefore, for the public interest and for the public good," Farnham § 113a, at 533 (NJ App. 1289a), and that it was "for the public good that [the soil between the shore and deep water] be devoted to that purpose." *Id.* Thus, as this Court later observed in *New Jersey v. Delaware II*, "riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers, and this though the title to the foreshore or the bed may have been vested in the State." 291 U.S. at 375.

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[10] The Farnham treatise pointed out that "[i]t is . . . a necessary incident of the right [to construct wharves and piers] that they shall project to a distance from the shore necessary to reach water which shall float vessels, the largest as well as the smallest, that are engaged in commerce upon the water into which they project." Farnham § 111, at 522.

That was the case in both New Jersey and Delaware, which generally permitted riparian owners to construct wharves and piers on their respective sides of the river outshore of the low-water mark. As we have noted, the 1851 Wharf Act had granted New Jersey riparian owners the right to wharf out to navigable water, provided that they received the appropriate licenses, and the 1871 Act authorized the Board of Riparian Commissioners to grant the required interests in submerged lands. *See* pages 3-4 *supra*. Having established bulkhead and pier lines extending well past the low-water mark, the Board then granted interests in submerged lands up to those lines. In Delaware, the State likewise had established permissible pier and bulkhead lines that extended beyond the mean low-water mark on its side of the river. *See* NJ App. 1198a, 1208a, 1209a; Castagna Report at 3 (Figures 2 and 3).

To be sure, as of 1905, New Jersey and Delaware were still at odds about ownership of the soil beyond the low-water mark on the New Jersey side. It is highly significant, therefore, that, despite this uncertainty about title, New Jersey had been freely granting interests in lands beyond the low-water mark for many years, to facilitate the construction of piers and wharves, without any protest from Delaware. As a result, when Article VII of the Compact specifically provided that New Jersey "*may continue to* . . . make grants . . . of riparian lands and rights under [its] laws . . .," it would naturally have been conveying ongoing authority for New Jersey to grant rights and lands below the low-water mark, as it had been doing, not just above it. Indeed, had Article VII not done so, New Jersey's ability to promote the commercial interests of its citizens would have been immediately threatened. *See* NJ App. 1227a-1239a (Weggel Report) (discussing trends in shipping and pier construction).

The continuing authority for each State to grant riparian lands and rights was then reinforced by Article VII's grant of "riparian jurisdiction of every kind and nature." Although the drafters did not define the term, the word "jurisdiction"

commonly refers to the "authority of a sovereign power to govern or legislate," Webster's Unabridged Dictionary (1898), NJ App. 1317a, and the authority to "exercise riparian jurisdiction of every kind and nature" naturally suggests that each State would be able to exercise regulatory control over the riparian improvements constructed pursuant to its grants of riparian lands and rights.[11] That understanding fits cleanly with the fact that, in another part of the Compact, Article II had given New Jersey jurisdiction over the wharves on its side, specifically prohibiting Delaware from serving process if a person or property is "on board a vessel aground upon or fastened to the shore of the State of New Jersey, or fastened to a wharf adjoining thereto . . . ." *See* Report, App. B, Art. II. Article II thus rested on the understanding that such wharves were generally within New Jersey's exclusive control, even though the wharves extended past "low-water mark on the New Jersey shore" into territory otherwise available for service of process by Delaware.

Although the Special Master objected to the idea that New Jersey could grant "lands" within what is now known to be Delaware territory, Report at 40-46, his view that it cannot do so—a conclusion skewed, of course, by the misplaced presumption against surrender of title (*see Virginia v. Maryland*, 540 U.S. at 67-69)—simply does not hold up. First of all, as we have noted, it is not a reasonable reading of the text: this constricted interpretation of Article VII treats New Jersey's authority to grant riparian lands (limited by the Special Master to New Jersey territory) as far narrower than its authority to grant riparian rights (not limited by the Special Master to

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[11] This Court has found such a conclusion to be reasonable even where a Compact did not expressly provide for riparian jurisdiction, noting in *Virginia v. Maryland* that "[i]f any inference at all is to be drawn from [the Compact's] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." 540 U.S. at 67.

New Jersey territory), even though the language of Article VII clearly makes them equivalent. *See* pages 27-28 *supra*. Moreover, it would be fundamentally illogical for the Compact drafters to have made the authority to grant riparian rights more extensive than the authority to grant riparian lands, given the fact that the riparian right to construct piers and wharves depends upon the ability to reach navigable water, *see* Farnham § 111, at 520, 522, which in turn depends on the State's authority to grant the interests in land necessary to erect the proposed structures. To provide the authority to grant riparian rights below the low-water mark, without the commensurate authority to grant riparian lands beyond that point, would have been largely an empty gesture.

2. *Riparian Authority and the Police Power.* The Special Master nevertheless determined that, despite these grants of riparian authority, Article VII allows Delaware to exercise jurisdiction over riparian improvements on the New Jersey side, apparently to the point of prohibiting them entirely. In doing so, he appeared to base his conclusion primarily on the idea that riparian authority amounts to just "a subset of the total bundle of police powers," Report at 58, and that Delaware is thus free, beyond the low-water mark, to use its police powers to prohibit what New Jersey would allow. But, though part of this analysis is correct, the bottom line is not. While Delaware certainly can exercise its police powers within its own territory, including on the eastern half of the river, it cannot do so insofar as its regulatory efforts would undercut the riparian authority given to New Jersey in Article VII. In the event of a conflict, Article VII properly takes precedence.[12]

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[12] New Jersey does not claim the right to exercise "full police powers" (Report at 58) beyond the low-water mark on its side of the river, only full riparian authority. For example, New Jersey acknowledges that Article VII does not authorize it to grant permits for its citizens to extract mineral deposits past the low-water mark, or to approve "non-riparian" structures.

That conclusion follows logically from the interdependent relationship between private rights and public interests. It is certainly true, as a starting point, that a State's police power is broader than its authority to define riparian interests, but that does not mean, as the Special Master appeared to believe, that the two are "separate." *See* Report at 56. To the contrary, a State's authority to make grants of "riparian rights" necessarily carries with it the complementary authority to determine how far those rights extend "under [its] laws" (at least absent overriding action by the federal government under the Supremacy Clause). Traditionally, a riparian owner's private rights of wharfage were regarded, not as absolute, but as qualified by—and thus defined by—the bounds of the larger public interest, including those aspects protected by the State's police power. In *Yates v. City of Milwaukee*, 77 U.S. 497 (1870), for example, this Court pointed out the inevitable connection between private rights and the public good, observing that "among those rights [of the riparian owner] [is] . . . the right to make a landing, wharf or pier for his own use or the use of the public, *subject to* such general rules and regulations as the legislature may see proper to impose for the protection of the public, whatever those may be." *Id.* at 504 (emphasis added). *See also Shively*, 152 U.S. at 40 (same). Likewise, the contemporary Farnham treatise, in addressing the interplay between riparian rights and the boundaries of those rights, specifically noted that "the limit of the private right is imposed by the public right, and the private right exists up to the point beyond which it will be inconsistent with the public right." Farnham § 64b, at 290 (discussing riparian water rights). It thus would have been totally contradictory for New Jersey and Delaware to have agreed that one State would have the exclusive power to grant riparian rights and that another State (or even both States together) would have the power to specify the limits of those rights. Those powers are not "separate" powers, Report

at 56, but related parts of the overall sovereign power to balance public and private needs.

To explain the purported separation between a State's authority over riparian rights and its police power, the Special Master placed great reliance on an 1867 opinion by the New Jersey Attorney General. *See* Report at 59-61; 1867 NJ AG Op. (Del. App. 905-911). But that opinion—which was, in any event, superseded by a new statutory scheme two years later (*see* 1869 N.J. Laws ch. 383)—provides little support. Dealing principally with whether the State could transfer lands below the low-water mark to non-riparian grantees, the opinion, in fact, makes quite clear that the right of a riparian owner to encroach on such lands depends entirely on permission from New Jersey, stating that the owner has no such rights "except so far as they are exercised by license under the [1851] general wharf act, or some special grant from the legislature . . . ." Del. App. 909. Furthermore, even with respect to the more extensive riparian "rights of enjoyment," the Attorney General emphasized that New Jersey may limit such rights, without compensation, for "navigation . . . and the great public uses for defence and public safety . . . ." Del. App. 911a. Those explanations, by their very nature, demonstrate that riparian "rights," far from existing "separate[ly]" from a State's general power to protect the public interest, are, in fact, largely defined by that power.[13]

This Court made a similar point in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), a case that Delaware has previously cited in its favor. There, in rejecting a claim by a riparian owner that it had an absolute right to export water to another State, Justice Holmes dismissed the idea of

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[13] The Attorney General also determined that the State could not authorize activities by *private* grantees that would interfere with the riparian owner's "rights of enjoyment"—even if those activities (*e.g.*, turnpikes, railroads) served the public interest in a broad sense—without the payment of compensation. Del. App. 911.

any such uncabined "right," famously observing that "[a]ll rights tend to declare themselves absolute to their logical extreme." *Id.* at 355. Justice Holmes then explained that "all [rights] in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached," *id.*, noting that "[t]he limits set to property by other public interests present themselves as a branch of what is called the police power of the state." *Id.* Once again, therefore, "the limits set to property" are not isolated from the property "right" itself but ultimately determine what the extent of that property "right" will be.

Despite contrary suggestions from the Special Master, *see* Report 58, this broad State authority to establish the limits of riparian rights does not suddenly terminate at the point of specifying the *use* of riparian structures. Setting limits on how property can be used is itself an integral part of defining what property rights are. Thus, it is well-understood that, as this Court recently observed, "[t]he right to improve property . . . is subject to the reasonable exercise of state authority." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *see Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"). Because the right to use property and the boundaries of that right are functionally inseparable, it would make little sense, for example, to speak of a property owner's "right" to develop his property without also taking account of the particular uses allowed (or prohibited) by relevant zoning regulations.

By the same token, it would be wholly unnatural to separate decisions about the right to construct riparian improve-

ments from decisions about the intended use of those improvements, as Delaware proposes to do here. In the first place, the scope of riparian rights has traditionally been defined, in part, by reference to the law of nuisance, *see, e.g.*, *The Auger & Simon Silk Co. v. East Jersey Water Co.*, 96 A. 60 (N.J.E. & A. 1915), which is by its nature directed at assuring that use of property does not injure the public. Moreover, and more specifically here, it was certainly understood in 1905 that riparian structures like piers and wharves were to be used for a particular purpose: the loading and unloading of cargo from vessels. If Delaware were claiming the power to prohibit *that* use, it would effectively be eliminating a riparian right that has prevailed for centuries. Yet, if Delaware's theory is that, under the Compact, one State can decide whether a pier can be built for the unloading of cargo but a different State can determine *what* cargo can be unloaded, it is simply cutting matters too fine. In 1905, the construction of piers and wharves on navigable rivers was regarded as vital to a State's interest in advancing commerce, *see* pages 32-33 *supra*, and it is fanciful to think that the Compact drafters would have agreed to give Delaware final say over the kind of commerce that New Jersey could promote.

Finally, the Special Master's view of Delaware's dominant police power is flatly contrary to the rigorously symmetrical structure of the 1905 Compact. As we have noted, *see* pages 31-32 *supra*, the Compact is organized according to a basic framework of giving the two States equal authority regardless of what the actual boundary turned out to be. Yet, according to the Special Master, Delaware has the power under Article VII to control riparian development on the New Jersey shore—at least by restricting it—even though New Jersey has no power at all over riparian development on the Delaware shore. That sharp inequality might be explicable if the parties had negotiated the Compact *after* this Court's

decision in *New Jersey v. Delaware II*, but, given the lack of certainty about the boundary in 1905, the negotiators expended obvious effort to make the Compact evenhanded. Nothing in it suggests that Delaware came away from the table with a one-way veto power over New Jersey's authority to approve riparian developments on its own side of the river.[14]

3. *Concurrent Jurisdiction and Virginia v. Maryland.* The power that Delaware seeks to assert over New Jersey projects is an extraordinarily sweeping one. Even in 1905, it was well recognized that a State's "police power" encompassed any power necessary "to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." *Fertilizing Company v. Hyde Park*, 97 U.S. 659, 669 (1878). Although the Special Master never actually says so, therefore, it would appear that, under his view of concurrent jurisdiction, Delaware could assert the right to prohibit all future riparian development on the New Jersey shore, based on nothing more than its judgment that further development would be unsightly and thus aesthetically displeasing to Delaware citizens. Or Delaware could use its zoning authority to allow recreational development, but not industrial development, on the New Jersey side. These kinds of decisions might well meet a test of rationality—looked at from Delaware's point of view—but there is little question that they would seriously limit, if not destroy,

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[14] The Special Master plainly found it implausible that Delaware would choose to cede broad authority to New Jersey in 1905. But, looked at without the improper presumption against surrender of title, the willingness of Delaware to continue what was, after all, the *status quo* is not surprising at all. At the time, the States were vigorously contesting the boundary between them, and this Court had already issued an injunction against Delaware placing great emphasis on the historical division of authority between the States. *See* note 8 *supra*. In addition, Delaware had never shown any interest in regulating riparian improvements on the New Jersey shore, and not a great deal more in regulating them on its own shore.

New Jersey's authority to grant riparian rights and exercise riparian jurisdiction. Thus, while the Special Master apparently saw the idea of "concurrent" powers as a middle ground between the States, the fact is that this parceling out of authority is no middle ground at all: it is an open license for Delaware to block any project on the New Jersey shore that it disapproves of.

Several Terms ago, this Court, in *Virginia v. Maryland*, rejected Maryland's assertion of just that kind of unbounded power. In that case, an 1877 arbitration award had recognized that Virginia, though owning only that part of the Potomac River up to the low-water mark on its own side, had a right to "such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership." *See* 540 U.S. at 69. Although Maryland contended that it could nonetheless regulate construction of a Virginia water intake station extending into its territory—invoking a comparable "police power" theory—the Court found that argument unpersuasive. Relying on the reasoning of the arbitrators' opinion, the Court recognized that "Virginia's right 'to erect . . . structures connected with the shore' is inseparable from, and 'necessary to,' the 'full enjoyment of her riparian ownership' of the soil to low-water mark." 540 U.S. at 72. So it is here: the right of New Jersey to approve wharves and piers built on its shores, even those extending beyond the low-water mark, is inseparable from her right to grant riparian rights and lands and to exercise riparian jurisdiction.

The Special Master sought to distinguish the holding in *Virginia v. Maryland*, pointing to "unique language of the compact and arbitration award in that case." Report at 64-65 n. 118. But nothing about the language at issue in *Virginia v. Maryland* is more protective of riparian rights than the language of Article VII here. For example, the Maryland-Virginia Compact referred to "the privilege of making and

carrying out wharves and other improvements," a privilege that is fully included within the term "riparian lands and rights" in Article VII. *See* pages 32-36 *supra*. And the reference in the Maryland-Virginia arbitration award to "full enjoyment of [Virginia's] riparian ownership" is, if anything, less comprehensive than Article VII's explicit conferral of "riparian jurisdiction, of every kind and nature," as well as the full authority to grant riparian rights and lands. Finally, whereas the Virginia-Maryland Compact referred only to the rights of "[t]he citizens of each state," 540 U.S. at 66, and the arbitrators' award addressed only Virginia's rights of "riparian ownership," 540 U.S. at 69, the 1905 Compact between New Jersey and Delaware expressly speaks to the question of *sovereign* authority over riparian matters, granting each State the authority to "exercise riparian jurisdiction" and to "make grants, leases, and conveyances of riparian lands and rights" on its own side of the river. Thus, the principles applied in *Virginia v. Maryland* apply with full force in this case as well.

II. POST-1905 ACTIONS BY THE PARTIES SUPPORT NEW JERSEY'S READING OF THE COMPACT

The Special Master, in explaining his interpretation of Article VII, placed considerable emphasis on the conduct of the two States after 1905. *See* Report at 68-84. But, while evidence of post-agreement behavior can help in construing contractual provisions, *see O'Connor v. United States*, 479 U.S. 27, 33 (1986), the Special Master made no distinction between post-1905 actions specifically referring to the Compact and actions making no reference to (and, indeed, showing no awareness of) the Compact. If the parties' subsequent conduct is to provide a "practical construction" of a Compact, however, it stands to reason that positions taken without knowledge of the Compact should carry less interpretive force than positions taken with the Compact squarely in mind.

Here, as we discuss, the latter evidence falls entirely on the New Jersey side.

A. *Actions By Delaware*. The most important post-Compact evidence is reflected in statements made by Delaware during the proceedings in *New Jersey v. Delaware II*. In its Reply Brief before the Special Master in that case, Delaware stated that "Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights." *See* NJ App. 123a. Then, in its oral argument before the Special Master, Delaware counsel asserted that "[w]e say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them*," NJ App. 126a-1 (emphasis added), adding for good measure that "it was a very sensible thing to do." *Id.*

Delaware made similar representations before this Court. In its Reply Brief to the Exceptions filed by New Jersey, Delaware told the Court that "the State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned now because it is clearly protected by the Compact of 1905 between the States." NJ App. 139a. Later in the same brief, Delaware declared that "[t]he effect of Article VII of the Compact . . . was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water," NJ App. 141a, noting further that "[t]his right had never been questioned and was undoubtedly inserted to put beyond question the *riparian* rights (as distinguished from *title*) of land owners in New Jersey." NJ App. 141. To state the obvious, nothing in these repeated observations suggests that the carefully protected "riparian rights"

were, in fact, subject to nullification by Delaware acting under its "police power."

These representations by Delaware were not just offhand reflections, but in fact played a important role in its claim for title. Responding to evidence that New Jersey had long regulated riparian improvements on its side of the river, Delaware went to great lengths to establish that this exercise of dominion did not demonstrate that New Jersey had *title*, but only that it had broad authority *under the Compact*. Thus, although it slightly qualified its language at one point, *see* Report at 90 (quoting NJ App. 142a), Delaware repeatedly argued that it had ceded riparian jurisdiction to New Jersey by agreement, allowing New Jersey to do what its title otherwise would not have permitted it to do. Furthermore, Delaware's reliance on the Compact served to deflect the practical concern that, if Delaware were to prevail on its boundary claim, it would suddenly be able to prohibit riparian improvements on the New Jersey side. As a result, following a proposal by the States themselves, *see* note 3 *supra*, this Court's decree declared that its boundary determination was "without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states." NJ App. 23.

The Special Master here sought to minimize the significance of Delaware's earlier representations, but much of his analysis is off the mark. Thus, while the Special Master said that "New Jersey has not pointed to any statements by Delaware in which it suggested that New Jersey would have the *exclusive* authority to regulate all aspects of riparian improvements, even if on Delaware's land," Report at 89, that overlooks a specific statement saying exactly that: the earlier declaration by counsel that "in my view the Compact of 1905 ceded to the State of New Jersey *all the right* to control the erection of those wharves and to say who shall erect them . . . ." NJ App. 126a-1 (emphasis added). And, contrary to the

view of the Special Master, the representations made by Delaware *did* indicate that "Delaware had given up any claim of jurisdiction also to regulate such [riparian] improvements to the extent they actually do intrude onto Delaware territory." Report at 90. For example, any claim that Delaware can regulate New Jersey riparian improvements to the point of prohibition—as Delaware has done with the Crown Landing project and any project involving "heavy industry use"—is directly contrary not just to Delaware's declaration that New Jersey has "all the right to control" the building of wharves on its side, but to its further representation that "the right of citizens of New Jersey to wharf out to navigable waters . . . is clearly protected by the Compact of 1905 between the States." NJ App. 139a. If Delaware can countermand what New Jersey allows its citizens to do, then the right of New Jersey citizens to build riparian structures like wharves and piers is obviously not "protected," as Delaware represented.

It is also notable that Delaware in the 1930s, having just established the boundary at the low-water mark on the New Jersey side, gave no indication that New Jersey's Compact-based authority over riparian improvements was in any way diminished. Most notably, Delaware neither gave notice to New Jersey that any improvements beyond the boundary line would need Delaware approval nor made any attempt to prohibit such improvements, and New Jersey continued to approve and regulate riparian structures for many years without interference. *See* pages 10-11 *supra*. Even two decades later, Delaware raised no objection to a 1954 formal opinion by the New Jersey Attorney General—provided to the Chief Deputy Attorney General of Delaware pursuant to an inquiry about the need for Delaware's approval of a New Jersey project, NJ App. 306a—stating that New Jersey had exclusive authority under the Compact to issue grants and

leases of riparian lands below the low-water mark on its side of the river. NJ App. 302a-304a (1954 NJ AG Op. No. 3).[15]

Finally, two specific examples of Delaware's understanding of the Compact are directly relevant. In 1957, after Delaware suggested that a DuPont project on the New Jersey shore might require Delaware's approval, counsel for DuPont objected, basing its objection in part on the "Treaty of 1905." NJ App. 636a-637a. Thereafter, counsel for the Delaware Highway Department advised the Department's Chief Engineer that "the State of Delaware has no jurisdiction over grants that may be made in and to the lands lying under the Delaware River on the New Jersey side thereof and within the twelve-mile circle, and that the prior approval of the State of Delaware in such matters is not required," NJ App. 640a, a view that the Chief Engineer accepted. NJ App. 641a. Similarly, more than a decade later, Delaware retreated from a demand to DuPont for lease payments applicable to submerged lands beyond the New Jersey low-water mark, after DuPont notified it that "the 1905 Treaty between New Jersey and Delaware ceded to the State of New Jersey full authority over subaqueous lands from the New Jersey shore to the center of the Delaware River, including the right to convey title to such lands." NJ App. 648a.

B. *Actions By New Jersey.* The Special Master concentrated his attention mainly on later events, beginning in 1971, including various statements and actions by New Jersey offi-

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[15] The Special Master failed to grasp the importance of this letter, discounting it on the ground that the Attorney General took the "inconsistent" view that New Jersey could not authorize the *dredging* of lands past the low-water mark. Report at 42 n.42. But the Attorney General was simply making a basic distinction between granting interests in submerged lands for traditional riparian purposes, such as the construction of piers and wharves, and granting interests for non-riparian purposes, such as general dredging by entities that are not riparian proprietors. NJ App. 304a. New Jersey does not claim the latter authority under Article VII.

cials that seemed to accept Delaware's regulation of projects on the New Jersey shore. But the most striking thing about this evidence is the lack of any reference by those New Jersey officials to the Compact itself, much less to the terms of Article VII. Indeed, the Special Master does not cite a single instance where a New Jersey official took note of the 1905 Compact and declared that, despite its language, Delaware still had the authority to control riparian development in New Jersey. As a result, there is nothing in this recent material that can fairly be said to reflect New Jersey's conscious view of the Compact.

The reliance by the Special Master on New Jersey's conduct thus becomes largely indistinguishable from a decision concluding that New Jersey has forfeited its Compact rights through prescription and acquiescence. *See, e.g., Illinois v. Kentucky*, 500 U.S. 380, 384-85 (1991); *New Jersey v. New York*, 523 U.S. at 807. Even if that were theoretically possible—a Compact is a federal law—it would be inappropriate here. For one thing, the Special Master mostly disregarded other probative evidence showing that New Jersey had maintained the exclusive right to regulate riparian improvements on its shores. *See, e.g., Main Associates, Inc. v. B.&R. Enterprises, Inc.*, 181 A.2d 541 (N.J.Super. Ch. 1962). Furthermore, to establish a loss of rights through prescription and acquiescence, a State must show that the relevant conduct continued for a "substantial" period of time, *Virginia v. Maryland*, 540 U.S. at 76; *New Jersey v. New York*, 523 U.S. at 786, and Delaware has not even argued that it can prevail under that standard. A State cannot work around that deficiency simply by recasting its evidence of "acquiescence" in order to revise the natural meaning of the Compact.

The Special Master also dismissed New Jersey's attempts to characterize much of the "acquiescence" evidence as signs of voluntary cooperation, *see* Report at 73, but that dismissal was too abrupt. The Federal Coastal Management Act, en-

acted in 1972, sought to encourage coordination and cooperation with respect to federal, state, and local management of the coastal zone, *see* 16 U.S.C. § 1452(4),(5), and it would have been fully in keeping with the Act for New Jersey to have coordinated its regulatory activities with Delaware whenever possible. And, given their long history of Delaware River disputes, it also makes sense for New Jersey to cooperate with Delaware in order to promote interstate comity, particularly because (until Delaware shut down the Crown Landing project) the States had been able to work together without actually inhibiting riparian development on the New Jersey shore. New Jersey's attempts at cooperation thus do not necessarily imply a narrow view of its rights under the (unmentioned) Compact. *See generally* 16 U.S.C. § 1456(e) (CZMA does not "displace, supersede, limit, or modify any interstate compact").

That said, it is unquestionably the case that, in a number of recent instances, New Jersey has accepted Delaware's involvement in the process of issuing permits for New Jersey improvements—including one improvement to be undertaken by New Jersey itself—without making any protest of Delaware's right to do so. But this small collection hardly is a match for the long history of instances noted in *Virginia v. Maryland*, in which Virginia officials had sought Maryland's approval for improvements on the Virginia shore. *See* 540 U.S. at 63. As this Court observed, "[b]etween 1957 and 1996, Maryland issued, without objection, at least 29 water withdrawal permits to Virginia entities" and "[s]ince 1968, it has likewise issued numerous waterway construction permits to Virginia entities." *Id.* Despite these activities, the Court nevertheless found that Virginia had not acquiesced in Maryland's legal right to exercise its police power over riparian improvements on the Virginia shore. *See* 540 U.S. at 76-80. And, while the Court did not separately reject this evidence as proof that the 1785 Compact and 1877 Award gave Maryland jurisdiction over Virginia projects, it seems highly doubtful

that it would have ruled against Maryland's claim of regulatory authority, as it did, if it had found the evidence to be persuasive. The evidence submitted by Delaware merits no greater weight.

CONCLUSION

The Exceptions of New Jersey to the Report of the Special Master should be sustained, and the Court should enter New Jersey's Proposed Decree (Report, App. G).

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No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Exceptions to the Report of the Special Master

REPLY BRIEF OF DELAWARE IN RESPONSE TO EXCEPTIONS BY NEW JERSEY TO THE REPORT OF THE SPECIAL MASTER

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QUESTIONS PRESENTED FOR REVIEW

The State of Delaware supports the Special Master's recommendations. The State of New Jersey has filed three exceptions, which present the following questions:

1. Whether New Jersey's first exception should be overruled because Article VII of the 1905 Compact – read in conjunction with Article VIII's reservation of territorial rights and this Court's cases disfavoring one State from having the power to make grants of another State's lands – does not expressly concede to New Jersey the right to grant submerged lands located within Delaware.

2. Whether New Jersey's second and third exceptions should be overruled because "riparian jurisdiction" does not mean "exclusive jurisdiction" over wharves and other riparian structures, and because a State's exercise of jurisdiction over specific private property rights pertaining to riparian landowners is subordinate to the exercise of general police powers, such as Delaware's application of its coastal zone management laws.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES vii

GLOSSARY xv

INTRODUCTION 1

STATEMENT 2

A. The Long-Running Boundary Dispute 2

1. *New Jersey I*: The fishing dispute 2

2. The 1905 Compact 4

3. *New Jersey II* 6

B. Jurisdiction Over Structures In Delaware 7

1. Delaware's regulation of riparian uses 7

2. Boundary-straddling structures within the twelve-mile circle 9

3. New Jersey's acknowledgment of Delaware's regulatory authority 10

4. The parties' history of cooperation 13

C. The Present Controversy 13

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. THE MASTER CORRECTLY FOUND THAT NEW JERSEY MAY NOT GRANT DELAWARE LANDS 18

A. The 1905 Compact Codifies The Bedrock Principle That A Sovereign State Has Exclusive Jurisdiction To Grant Its Own Lands 18

B. Article VII Gives New Jersey No Right To Grant Delaware Lands 20

C. New Jersey's Exceptions Are Unpersuasive 23

1. *Virginia v. Maryland* is inapposite 23

2. New Jersey's symmetry arguments lack merit 25

3. Article IX does not support New Jersey 26

4. New Jersey's assumption that "side" means "half" of the river is flawed 27

II. DELAWARE MAY EXERCISE POLICE POWER JURISDICTION OVER RIPARIAN IMPROVEMENTS LOCATED IN DELAWARE 29

A. Riparian Rights Are Subject To The State's Exercise Of Its Police Powers 30

B. Delaware Seeks To Exercise Its Police Powers 33

C. New Jersey's Exceptions Lack Merit 35

1. "Riparian" is not "exclusive" jurisdiction 35

2. *Hudson County* does not support New Jersey 37

3. The right to wharf out does not include a right to unload any particular cargo 39

4. Concurrent jurisdiction over wharves is administrable and rooted in the historical relations of the two States 41

5. The States' conduct since 1905 supports Delaware's exercise of its police powers within Delaware.....44

CONCLUSION.....48

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Federal

Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269 (1877) 46

Coffee v. Groover, 123 U.S. 1 (1887) 19, 20

Cummings v. City of Chicago, 188 U.S. 410 (1903) 7, 33-34, 39, 43

Georgia v. South Carolina, 497 U.S. 376 (1990) 44

Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) 7

Henderson Bridge Co. v. Henderson City, 173 U.S. 592 (1899) 42

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) 33, 37, 38, 39

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 33, 35, 43

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 40

Massachusetts v. New York, 271 U.S. 65 (1926) 19

New Jersey v. Delaware, 291 U.S. 361 (1934) 1, 2, 5, 6, 7, 15, 18, 20, 21, 27, 30, 38, 45, 46, 47

New Jersey v. New York, 523 U.S. 767 (1998) 17, 19, 42

Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987) 34

O'Connor v. United States, 479 U.S. 27 (1986) 46

Pea Patch Island, In re, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311) 2

Pennoyer v. Neff, 95 U.S. 714 (1878) 19

Poole v. Lessee of Fleeger, 36 U.S. (11 Pet.) 185 (1837) 19

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 35

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 18

Shively v. Bowlby, 152 U.S. 1 (1894) 40

Texas v. New Mexico, 482 U.S. 124 (1987) 19

United States v. Alaska, 521 U.S. 1 (1997) 19

United States v. Cherokee Nation, 480 U.S. 700 (1987) 19

United States v. River Rouge Improvement Co., 269 U.S. 411 (1926) 41

United States v. Stuart, 489 U.S. 353 (1989) 46

United States v. Texas, 162 U.S. 1 (1896) 19

Virginia v. Maryland, 540 U.S. 56 (2003) 23, 24, 43

Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873) 31

Wedding v. Meyler, 192 U.S. 573 (1904) 44

Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1871) 31

State

Bridge over Delaware River v. Trenton City Bridge Co., 13 N.J. Eq. 46, 1860 WL 5184 (N.J. Ch. 1860) 42

Central R.R. Co. v. Mayor of Jersey City, 56 A. 239 (N.J. Sup. Ct. 1903), *aff'd*, 61 A. 1118 (N.J. 1905), *aff'd*, 209 U.S. 473 (1908) 28, 36

City of Wilmington v. Parcel of Land, 607 A.2d 1163 (Del. 1992) 8

Coastal Barge Corp. v. Coastal Zone Indus. Control Bd., 492 A.2d 1242 (Del. 1985).....34

Costigan v. Pennsylvania R.R. Co., 23 A. 810 (N.J. Sup. Ct. 1892).....44

Gough v. Bell, 22 N.J.L. 441, 1850 WL 4394 (N.J. Sup. Ct. 1850), *aff'd*, 23 N.J.L. 624, 1852 WL 3448 (N.J. 1852).....31

Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435, 1882 WL 2713 (1882).....31

Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.:

18 N.J. Eq. 13, 1866 WL 88 (N.J. Ch.), *aff'd*, 18 N.J. Eq. 511, 1866 WL 89 (N.J. 1866).....44

18 N.J. Eq. 511, 1866 WL 89 (N.J. 1866).....41

Lehigh Valley R.R. Co. v. Mutchler, 13 Vroom 461, 1880 WL 7765 (N.J. Sup. Ct. 1880).....28, 42

McCarter v. Hudson County Water Co., 65 A. 489 (N.J. 1906), *aff'd*, 209 U.S. 349 (1908).....31

New York v. Central R.R. Co. of New Jersey, 42 N.Y. 283 (1870).....36

New York, Lake Erie, & W.R.R. Co. v. Hughes, 17 Vroom 67, 1884 WL 7630 (N.J. Sup. Ct. 1884).....28

Obrecht v. National Gypsum Co., 105 N.W.2d 143 (Mich. 1960).....39

Stevens v. Paterson & Newark R.R. Co., 34 N.J.L. 532, 1870 WL 5140 (N.J. 1870).....19

Foreign

Penn v. Lord Baltimore, 1 Ves. Sen. 444, 27 E.R. 1132 (1750).....2

ADMINISTRATIVE DECISIONS

Crown Landing LLC, 115 FERC ¶ 61,348 (June 20, 2006), *petition for review pending, Delaware DNREC v. FERC*, No. 07-1007 (D.C. Cir.) 14

CONSTITUTION, STATUTES, AND REGULATIONS

Federal

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) 34

Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact) 1, 28, 35, 36, 42

Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 Delaware-New Jersey Compact) ..... *passim*

Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* 8

16 U.S.C. §§ 1454-1455 8

Natural Gas Act, § 3(a), 15 U.S.C. § 717b(a) 14

State

Delaware

Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* 8, 9, 10, 11, 14, 17, 33, 34, 42, 44

§ 7001 33

§ 7002(a) 8

§ 7003 8

65 Del. Laws ch. 508 (1986) 9

Revised Code of Delaware, 1874, ch. 1, § 2 28

Subaqueous Lands Act, Del. Code Ann. tit. 7, ch. 72 9

Delaware River Basin Water Code (Aug. 14, 2007), *available at* http://www.state.nj.us/drbc/regs/watercode_092706.pdf 29

Maryland

1785-1786 Md. Laws ch. 1 (1785 Virginia-Maryland Compact) 23, 24

New Jersey

1821 N.J. Laws p. 6, § 1 28

1905 N.J. Laws ch. 42 46

N.J. Stat. Ann.:

§§ 52:28-23 to 52:28-32 (1783 New Jersey-Pennsylvania Compact) 36, 42

§§ 52:28-34 to 52:28-45 (1905 Delaware-New Jersey Compact) 46

Pennsylvania

71 Pa. Cons. Stat. §§ 1801-1817 (1783 New Jersey-Pennsylvania Compact) 36, 42

Virginia

1785 Va. Acts ch. 17 (1785 Virginia-Maryland Compact) 23, 24

ADMINISTRATIVE MATERIALS

Delaware River Basin Commission, www.state.nj.us/drbc 43

Letter from Robert H. Richards, Delaware Attorney General, to Chairman of the House Judiciary Committee (Jan. 19, 1907) 6

N.J. Att'y Gen.:

Formal Op. No. 22 (Nov. 16, 1956) 20

Opinion Concerning Riparian Rights (Mar. 15, 1867) 32, 33

New Jersey Dep't of Envtl. Protection, *Options for New Jersey's Developed Coast* (Mar. 1979) 11, 13, 46

New Jersey Dep't of Envtl. Protection & National Oceanic and Atmospheric Admin.:

New Jersey Coastal Management Program and Final Environmental Impact Statement (Aug. 1980) 11, 12

State of New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Final Environmental Impact Statement (Aug. 1978) 11

Opinion No. 78-018, 1978 Del. Op. Atty. Gen. (Oct. 5, 1978) 9

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1 Henry P. Farnham, *The Law of Waters and Water Rights* (1904) 7, 8, 30, 31

Motion of Respondent FERC To Dismiss or Alternatively To Hold in Abeyance Petition for Review, *Delaware DNREC v. FERC*, No. 07-1007 (D.C. Cir. filed Mar. 1, 2007) 34

Reply Brief of the State of New Jersey in Opposition to the Exceptions of the State of New York, *New Jersey v. New York*, No. 120, Orig. (U.S. filed Aug. 29, 1997) 43

Restatement (Second) of Torts (1977) 7, 31

Webster's International Dictionary (1898) 22

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1783 Compact	N.J. Stat. Ann. §§ 52:28-23 to 52:28-32; 71 Pa. Cons. Stat. §§ 1801-1817 (1783 New Jersey-Pennsylvania Compact) (DA 4401-06)
1785 Compact	1785-1786 Md. Laws ch. 1; 1785 Va. Acts ch. 17 (1785 Virginia-Maryland Compact)
1834 Compact	Act of June 28, 1834, ch. 126, 4 Stat. 708 (1834 New Jersey-New York Compact) (DA 885-88)
1877 Complaint	Complaint, *New Jersey v. Delaware*, No. 1, Orig. (U.S. filed Mar. 13, 1877) (DA 6-40)
1905 Compact	Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1905 Delaware-New Jersey Compact) (App., *infra*, 1a-5a; DA 11-14)
BP	B.P. p.l.c.
Cherry Aff.	Affidavit of Philip Cherry in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4303-10)
CMP	Coastal Management Program
CZMA	Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.*

DA	Delaware's Appendix on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DCZA	Delaware Coastal Zone Act of 1971, Del. Code Ann. tit. 7, §§ 7001 *et seq.*
DE SJ Br.	Delaware's Motion for Summary Judgment and Supporting Brief, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
DE SJ Opp.	Delaware's Brief in Opposition to New Jersey's Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Feb. 1, 2007)
DE SJ Reply Br.	Delaware's Reply Brief in Support of Its Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Feb. 15, 2007)
DNREC	Delaware Department of Natural Resources and Environmental Control
DRBC	Delaware River Basin Commission
Farnham	Henry P. Farnham, *The Law of Waters and Water Rights* (1904)
FERC	Federal Energy Regulatory Commission

Hansen Aff.	Affidavit of R. Peder Hansen in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4319-22)
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Hoffecker Rep.	Expert Report of Carol E. Hoffecker, Ph.D. (dated Nov. 9, 2006) (DA 4213-77)
LNG	Liquefied Natural Gas
Moyer Aff.	Affidavit of William Moyer in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4349-57)
New Jersey I	*New Jersey v. Delaware*, No. 1, Orig. (U.S. filed Mar. 13, 1877)
New Jersey II	*New Jersey v. Delaware*, 291 U.S. 361 (1934)
NJ 1978 CMP	State of New Jersey Coastal Management Program – Bay and Ocean Shore Segment and Final Environmental Impact Statement (Aug. 1978) (DA 4627-34) (excerpt)

NJ 1979 Options Report	New Jersey Dep't of Envtl. Protection, Options for New Jersey's Developed Coast (Mar. 1979) (excerpt) (DA 2383-2517)
NJ 1980 CMP	New Jersey Coastal Management Program: Final Environmental Impact Statement (Aug. 1980) (DA 2627-3170)
NJ Reopen App.	Appendix to Motion To Reopen and for a Supplemental Decree, Petition, and Brief, *New Jersey v. Delaware*, No. 11, Orig. (U.S. filed July 28, 2005)
NJ SJ Br.	New Jersey's Brief in Support of Its Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
NJA	Appendix of the State of New Jersey on Motion for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006)
NJDEP	New Jersey Department of Environmental Protection
Rep.	Report of the Special Master, *New Jersey v. Delaware*, No. 134, Orig. (Apr. 12, 2007)
Reuther Aff.	Affidavit of Kurt Reuther in Support of Delaware on Cross-Motions for Summary Judgment, *New Jersey v. Delaware*, No. 134, Orig. (U.S. filed Dec. 22, 2006) (DA 4359-70)

Sax Rep.	Expert Report of Professor Joseph L. Sax (dated Nov. 7, 2006) (DA 4279-4302)
Whitney Dep.	Deposition of Steven Whitney, *New Jersey v. Delaware*, No. 134, Orig. (Oct. 10, 2006) (DA 771-810)

INTRODUCTION

This case concerns Delaware's authority to exercise its police powers within a twelve-mile circle in the Delaware River that this Court conclusively determined to be Delaware's sovereign territory in *New Jersey v. Delaware*, 291 U.S. 361 (1934) ("*New Jersey II*"). The Special Master correctly applied two established legal doctrines to interpret the 1905 Compact, each of which supports rejecting New Jersey's exceptions. *First*, for centuries this Court has recognized the bedrock principle that a State has full sovereignty over its lands up to its boundary line and the corollary that an adjoining State may not grant lands belonging to another State. The Master correctly interpreted Article VIII of the Compact to require an express statement to affect either State's territorial rights. In light of that shared presumption against relinquishment of jurisdictional rights, the Master properly read Article VII, which provides that each State "may . . . continue . . . to make grants" of riparian lands on its "own side" of the Delaware River, as not expressly conceding sovereignty over lands that Delaware had always claimed, and later conclusively proved, were part of its territory.

Second, this Court has long recognized that a private riparian landowner's exercise of riparian rights is generally subordinate to a State's exercise of police powers. Even if the Compact somehow could be read as an express surrender to New Jersey of jurisdiction to make grants of Delaware's submerged lands, Delaware nonetheless has authority to continue to exercise its police powers over activities within its boundary. In its 1834 Compact with New York, New Jersey negotiated an express declaration that it "shall have . . . exclusive jurisdiction" over wharves, but the agreed-upon language in the 1905 Compact is quite different, merely giving each State permission to continue to exercise "riparian jurisdiction" on its "own side" of the Delaware River at a time when the States could not agree on their territorial limits and jurisdictional rights. The modifier "riparian" necessarily limits

the scope of the jurisdiction addressed in Article VII and does not impinge on the fundamental power of Delaware to regulate activities within its boundary. Because the Master's recommendations properly applied those two settled doctrines to the 1905 Compact, they should be adopted by this Court.

STATEMENT[1]

A. The Long-Running Boundary Dispute

For centuries until this Court's definitive resolution of the boundary in 1934, Delaware and New Jersey disputed their Delaware River boundary within an area known as the "twelve-mile circle," whose center is the courthouse in New Castle, Delaware. *New Jersey II*, 291 U.S. at 374. Delaware claimed sovereign title to the waters and submerged lands of the river within the circle to the low-water mark on the New Jersey shore based on a 1682 grant from the Duke of York to William Penn. New Jersey claimed title to the middle of the channel. *See id.* at 363-64. This Court found that Penn had always claimed ownership of the subaqueous soil of the river and that court decisions in prior centuries supported Delaware's claim. *See id.* at 374.[2]

1. *New Jersey I*: The fishing dispute

In 1872, Delaware arrested New Jersey citizens for fishing in the eastern half of the river without a Delaware license, setting off an interstate dispute over fishing rights that stirred up longstanding disagreements over boundary and jurisdiction. *See* Rep. 3-4. New Jersey's Governor proclaimed that New Jersey owned the eastern

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[1] For more on the long history of this dispute, *see* Report of the Special Master 2-29 ("Rep."); DE SJ Br. 3-23; DE SJ Opp. 2-19. (Full references to sources and terms for which abbreviated descriptions are provided can be found in the glossary, *supra* pp. xv-xix.)

[2] *See New Jersey II*, 291 U.S. at 367-68 (discussing *Penn v. Lord Baltimore*, 1 Ves. Sen. 444, 27 E.R. 1132 (1750) (upholding Penn's title)); *id.* at 373, 377 (discussing *In re Pea Patch Island*, 30 F. Cas. 1123 (Arb. Ct. 1848) (No. 18,311) (upholding Delaware's title)).

half of the river, and Delaware's Governor responded by asserting exclusive jurisdiction "'over the waters of said river to low water mark, on the eastern side of said river, within the twelve mile circle from New Castle.'" Rep. 4 (quoting DA 929-30).

The commissioners appointed by both States to negotiate an interstate compact were unable to resolve the dispute. *See* DA 963-81; Rep. 4-5. In 1877, New Jersey filed suit, asking this Court to determine the boundary line and claiming that its part of the riverbed extended "from the New Jersey shore thereof to the middle of said river." DA 20 (1877 Complaint). New Jersey also claimed that it had gained sovereignty by prescription and acquiescence, through its licensing of "wharves, docks, piers and other structures." DA 36. However, the only practical controversy identified in New Jersey's complaint concerned fishing rights and Delaware's claimed authority to enforce its fishing license requirement. *See* DA 37-38. The Court granted New Jersey's motion for a preliminary injunction against Delaware's enforcement of its fishing laws on the eastern half of the river. *See* DA 66-68 (Order). By agreement, the case then lay dormant for nearly 25 years. When it filed its Answer in 1901, Delaware specifically asserted title to the submerged lands within the twelve-mile circle and claimed that New Jersey could not acquire "territory, jurisdiction, rights, [or] privileges" unless Congress and the States "expressly and formally consented thereto." DA 118-19.

In 1903, the States appointed commissioners to negotiate a compact, which the New Jersey legislature approved. The Delaware legislature rejected it, however, on the grounds that the compact would harm Delaware fishermen and that it was submitted without proper notice, precluding adequate debate and requiring it to be "rushed through the house with undue haste." DA 4749-50; *see* Rep. 6-7. At the time that the compact was drafted in February-March 1903, New Jersey had not submitted any evidence. By letter dated January 31, 1903, less than two

weeks before the commissioners first met to negotiate the compact, one of Delaware's commissioners and counsel in *New Jersey I*, Attorney General Herbert Ward, advised his Governor that, while proving Delaware's jurisdiction would "entail very considerable expense," "[t]he very laborious and critical examination of ancient documents . . . which preceded the preparation of the somewhat voluminous Answer of the State . . . has greatly strengthened the belief and reliance of counsel for this State upon the justice of her claim." DA 1074-76. While expressing a "well grounded hope that the State of Delaware would be ultimately successful in the suit," Ward advised that, "if the entire controversy between the two States can be settled out of court in a manner creditable and satisfactory to both States, it would seem the part of good reason to attempt to make such a settlement." DA 1076. The record contains no evidence that Delaware ever perceived that it needed to make concessions to New Jersey on its territorial claims to resolve the fishing dispute, and its long-held position on its boundary claim was confirmed by the Court's 1934 decision.

After further proceedings, in February 1905, the parties again appointed commissioners, who agreed to a compact identical to that negotiated in 1903 in all respects relevant here. *See* DA 4245-52 (Hoffecker Rep. 33-40); Rep. 7-8. The States approved the Compact in 1905. *See* Rep. 8.

2. The 1905 Compact

Adopting language from the resolutions appointing the negotiating commissioners, the Preamble to the 1905 Compact declares that the commissioners had been appointed "for the purpose of agreeing upon and settling the jurisdiction and territorial limits of the two States" and "to frame a compact . . . looking to . . . the final adjustment of all controversies relating to the boundary line between [the] States."[3] Notwithstanding those ambitious goals, the Articles of the Compact themselves achieved a

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[3] For the 1905 Compact's text, *see* App., *infra*, 1a-5a; Rep., App. B.

limited resolution of the actual controversies that had caused the litigation – fishing rights and the power to make arrests on the river. The first four of the Compact's eight substantive Articles use specific geographic descriptions in addressing certain topics (including criminal jurisdiction and fishing rights) that rendered irrelevant the ultimate location of the boundary, but the next three Articles (V, VI & VII) do not use any specific geographic descriptions at all.

Articles I-III went into effect immediately but were subject to further refinement in Articles IV and V. Under Articles I and II, each State could serve criminal process for crimes "committed upon the soil of said State" or upon "the eastern half of said Delaware River" for New Jersey and "the western half of said Delaware River" for Delaware. Article III provides that the inhabitants of both States "shall have and enjoy a common right of fishery" "between low-water marks on each side" of the river.

Article IV sets forth a process for each State to appoint commissioners to "confer" "for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River." Those uniform laws, upon adoption, would become the "sole laws" regulating fishing in the river, and each State would then "have and exercise exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants for violation of the concurrent" fishing laws. The Compact does not use the term "exclusive jurisdiction" anywhere else. *See* Rep. 12-14. Article V provides that the two States' current fishing laws "not inconsistent with the right of common fishery" discussed in Article IV "shall continue in force" until the enactment of the concurrent fishing laws provided for in Article IV. Article VI provides that nothing in the Compact shall affect the shellfish and oyster industry. This status quo provision ultimately led to *New Jersey II*'s resolving, in Delaware's favor within the twelve-mile circle, a dispute over where Delaware could regulate that industry.

Article VII provides that "[e]ach State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States." No historical evidence appears to exist of any actual dispute presented in the pleadings in *New Jersey I* that occasioned the drafting of Article VII. *See* DA 4238-41 (Hoffecker Rep. 26-29).

Article VIII reserves the States' rights: "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth." And Article IX sets forth the procedures for the Compact's execution, ratification, and binding nature "in perpetuity" on both States.

In 1907, Congress ratified the Compact. *See* Rep. 13. Its modest scope in resolving outstanding practical difficulties was confirmed in a joint submission for both States, with counsel explaining to this Court that the "main purpose" of the Compact was to enact "a joint code of laws regulating the business of fishing in the Delaware River and Bay." DA 190.[4] The parties told the Court that the Compact is "not a settlement of the disputed boundary, but a truce or *modus vivendi*." *Id.*

3. *New Jersey II*

In 1929, New Jersey filed a second original action to resolve a dispute concerning oyster beds (which had been left open in Article VI). *See* Rep. 14.[5] In *New Jersey II*,

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[4] *See also* DA 1248 (Letter from DE Att'y Gen. Robert H. Richards to Chairman of the House Judiciary Comm. (Jan. 19, 1907)) ("The object and purpose of this Compact was to settle certain matters concerning fisheries which had been the cause of the litigation for years pending in the Supreme Court of the United States between the two States.").

[5] New Jersey's Attorney General explained in a printed report requested by the New Jersey Governor that the suit was also intended to resolve New Jersey's uncertainty over its rights regarding "wharves, buildings and other improvements" on lands within the twelve-mile circle, and he reported that "no agreement has ever been reached

this Court upheld Delaware's sovereign title to the land, including submerged lands, up to the low-water mark on the New Jersey shore of the Delaware River within the twelve-mile circle. *See* 291 U.S. at 365-78.[6] The Court dismissed as "wholly without force" New Jersey's argument that, in the 1905 Compact, Delaware abandoned its claim to the lands at issue. *Id.* at 377. The Court held that the Compact "provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go." *Id.* at 377-78 (discussing and quoting Article VIII).[7]

B. Jurisdiction Over Structures In Delaware

1. Delaware's regulation of riparian uses

At the time of the 1905 Compact, owners of riparian lands – lands adjacent to waterways – had authority to exercise a cluster of property rights called "riparian rights," which included the rights to construct wharves extending into an adjacent river, to fish, and to extract water. *See* Rep. 40-41 (citing Restatement (Second) of Torts § 843 (1977)), 46-49 (describing historic right to wharf out); 1 Henry P. Farnham, *The Law of Waters and Water Rights* 281, 302 (1904) ("*Farnham*"). The riparian right to wharf out included "reasonable access to and use of the adjacent water, subject to appropriate regulation" by the State. Rep. 49 (citing *Cummings v. City of Chicago*, 188 U.S. 410, 427 (1903); *Head v. Amoskeag Mfg.*

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between them except upon the right of citizens of both states to fish in the river and bay." DA 2084, 2087.

[6] The Court also resolved a dispute (unrelated to the present controversy) over the States' boundary south of the twelve-mile circle. The Court upheld New Jersey's claim of sovereign title up to the middle of the navigable channel, thereby giving New Jersey sovereignty over submerged lands with valuable oyster beds. *See* 291 U.S. at 378-85.

[7] The States immediately disputed under Article VII whether Delaware could tax wharves extending from New Jersey into Delaware. *See* DA 2095-2135. Commissioners appointed in 1935 were unable to resolve that issue. *See* DA 1987-91, 2137, 2143, 2147-2205.

Co., 113 U.S. 9, 21 (1885)); *see also* DE SJ Br. 49-50. Riparian rights were and remain "always subordinate to the public rights, and the state may regulate their exercise in the interest of the public." 1 *Farnham* 284. From the 1700s to 1961, Delaware permissively regulated riparian rights through the common law subject to the State's "power to regulate or restrict private riparian property rights for public purposes." *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1168-69 (Del. 1992).

In 1961, Delaware enacted its first statute regulating submerged lands, and, in 1966, it adopted a more comprehensive law governing leases of state-owned subaqueous lands. *See* Rep. 70-71 (describing regulatory history). The small number of piers and wharves built before the new regulatory regime were formally grandfathered, and Delaware required permits for any subsequent modifications or new structures. *See id.*

In 1971, Delaware enacted the Delaware Coastal Zone Act, Del. Code Ann. tit. 7, §§ 7001 *et seq.* ("DCZA"), prohibiting "[h]eavy industry uses of any kind" and "offshore gas, liquid, or solid bulk product transfer facilities" within the coastal zone, *id.* § 7003, which includes "land, water [and] subaqueous land between the territorial limits of Delaware in the Delaware River, Delaware Bay and Atlantic Ocean," *id.* § 7002(a). In 1972, Delaware rejected as a prohibited bulk transfer facility an application by the El Paso Eastern Company ("El Paso") to build a liquefied natural gas ("LNG") unloading facility extending from New Jersey into Delaware. *See* DA 3469-72, 3477-78, 3483-84.

Also in 1972, Congress enacted the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* ("CZMA"), which permits States to submit coastal zone management programs to the Secretary of Commerce for review and approval, in return for which the States receive federal funding for coastal management. *See id.* §§ 1454-1455. Delaware's coastal zone management program, approved in 1979, concludes that "there is no site in Delaware suitable

for the location of any LNG import-export facility." DA 2591. That conclusion was consistent with a 1978 formal opinion by Delaware's Attorney General finding that the DCZA would prohibit bulk transfer facilities located in Delaware on a pier originating on the New Jersey shore. *See* DA 3882-84 (Del. Op. Att'y Gen. 78-018). Delaware's coastal zone management program also rejected a comment by Salem County, New Jersey, that Delaware law "'unduly restricts development along the Delaware River in New Jersey,'" stating that Delaware's "'jurisdiction extends to the low water mark on the New Jersey shore.'" Rep. 72 (quoting DA 2600, 2605). Finally, in 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508, Del. Code Ann. tit. 7, ch. 72, authorizing its Department of Natural Resources and Environmental Control ("DNREC") to regulate any potentially polluting use made of Delaware's subaqueous lands and to grant or lease property interests in state submerged lands. *See* Rep. 71.

2. Boundary-straddling structures within the twelve-mile circle

The record shows that only 14 wharves and piers have ever extended from the New Jersey shore into Delaware within the twelve-mile circle in the last 155 years. *See* Rep. 74. Eleven were built before 1969 during Delaware's common-law regulation era, and those structures were treated as grandfathered under Delaware's regulations. *See id.* Only three of those grandfathered structures arguably extended more than 500 feet from the boundary, the longest being between 600 and 700 feet. *See* DA 4332-33 (Herr Aff. ¶ 28(a), (c), (d)). New Jersey identified only three structures extending past the low-water mark into the twelve-mile circle in 1905. *See* NJ SJ Br. 4-5 & n.4.

Since 1969, only three cross-boundary structures have been built, all regulated by Delaware. *See* Rep. 74-77. *First*, in 1971, Delaware granted a subaqueous lands lease to E.I. du Pont de Nemours & Co. ("DuPont") to dredge Delaware submerged soil, build a dock, and construct a fuel oil storage tank at the DuPont Chambers

Works facility extending from the New Jersey shore. *See* Rep. 74-75. *Second*, in 1990 and 1991, Delaware permitted a proposed coal unloading pier by Keystone Cogeneration Systems and issued a DCZA permit and a subaqueous lands lease (and renewals) for the project. *See* Rep. 75. *Third*, in 1996, Delaware granted the New Jersey Parks and Forestry Division's own request for a subaqueous lands lease to refurbish a pier at New Jersey's Fort Mott State Park, and in 2006, while this litigation was pending, New Jersey applied to Delaware for a renewal. *See* Rep. 75-76. In 2005, Delaware also issued a permit to refurbish an existing pier at Penns Grove, but that work apparently has not yet begun.[8] Recent aerial photographs of the twelve-mile circle depict only those four structures.[9]

Delaware also has required permits for pipelines and power lines crossing the river within the twelve-mile circle.[10] It regularly responds to police, fire, and other 911 requests on the eastern half of the river, *see* DA 4339-42, 4359-66, 4381-99, and taxes a cross-boundary project, *see* NJA 1491a (DE Interrog. Resp. No. 34); DA 4855-57.

3. New Jersey's acknowledgment of Delaware's regulatory authority

For at least a half-century, New Jersey has recognized Delaware's authority over the submerged lands within the twelve-mile circle beyond the low-water mark. In a formal Attorney General opinion in 1956, New Jersey conceded that the 1905 Compact "gave the State of New Jersey no proprietary rights in the soil within the twelve-mile circle," and "New Jersey has no ownership in the soil offshore of said low-water mark." NJA 309a, 312a. In 1972, shortly before Delaware denied permission under the DCZA for the El Paso-proposed LNG facility, it

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[8] *See* DA 3839-44; DA 4327 (Herr Aff. ¶ 15).

[9] *See* DA 4207 (Keystone), 4208 (Penns Grove), 4209 (DuPont), 4210 (Fort Mott), 4211-12 (none), 4367-69 (Reuther Aff. ¶¶ 56-71).

[10] *See* DA 3323-30, 3337-43, 3351-61, 3367-70, 3375-79, 3381, 3755-59 (Columbia Gas, Delmarva Power, and Colonial Pipeline).

notified the Commissioner of New Jersey's Department of Environmental Protection ("NJDEP"), which raised no objection to Delaware's vetoes of LNG terminals or other cross-boundary projects. *See* DA 3481-85.

In 1979, after a multi-year review process for its own coastal zone management plan and a pledge to develop its position on boundary issues with Delaware through consultation with its Attorney General,[11] New Jersey issued a report, "Options for New Jersey's Developed Coast" ("1979 Options Report"), which analyzed Delaware's coastal zone laws and concluded that Delaware may regulate or prohibit a proposed project extending from New Jersey into Delaware. *See* DA 2455, 2509-12. A separate appendix noted the boundary as determined by this Court and concluded that "major development extending into the Delaware River could require approval from the State of Delaware, in addition to approvals from the State of New Jersey." DA 2509. The report recognized that the DCZA applied to cross-boundary projects and that "some types of activities would be *prohibited* from locating along the Delaware River in Salem County, while other facilities desiring to locate along the river would need to *obtain permit approval* from the State of Delaware." *Id.* (emphases added). The report added that, since the DCZA took effect in 1971, "no activity has taken place along the Salem County shoreline which would come under the jurisdiction of the Act." DA 2511; *see also* Rep. 78-80.

New Jersey then developed a 1980 coastal plan that "even more clearly recognized that Delaware has the right to exercise regulatory jurisdiction within the twelve-mile circle." Rep. 81. The plan acknowledged that, "[i]n most of Salem County, the Delaware-New Jersey State boundary is the mean low water line on the eastern (New Jersey) shore of the Delaware River," and it stated that *both*

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[11] *See* DA 4630 (NJ 1978 CMP) ("[NJDEP] will also work with . . . the Attorney General of New Jersey . . . in the next year to resolve boundary issues between New Jersey, Delaware and New York.").

States' "Coastal Management agencies . . . have concluded that any New Jersey project extending beyond mean low water *must obtain coastal permits from both states*." DA 2657 (emphasis added). It also decreed that both States would "coordinate reviews of any proposed development that would span the interstate boundary to ensure that no development is constructed unless it would be consistent with both state coastal management programs." *Id.*

The 1980 draft New Jersey coastal management plan was widely distributed to thousands of interested parties and was reviewed by New Jersey's Governor, Attorney General, legislators, and state agencies,[12] none of whom disputed that Delaware has regulatory authority over boundary-straddling projects. Only Salem County expressed "'strong[] oppos[ition] to the statement . . . that any project in the area must be consistent with both Delaware's and New Jersey's coastal programs and obtain permits from two states,'" but New Jersey rejected that protest in its 1980 plan. Rep. 81-82 (quoting DA 3135).

Finally, in 1989, New Jersey and Delaware amended a 1961 compact concerning public "crossings" (such as bridges) between the two States that are operated by a bi-state entity created by that compact. *See* DA 4433-43 (creating the bi-state Delaware River Basin Authority). The 1989 amendment required that "any project, other than a crossing," with "project" defined to include boundary-straddling "[t]ransportation facilit[ies] . . . adapted for public use" such as "wharves," DA 4434, "shall comply with all . . . coastal zone laws . . . promulgated by the state in which the project, *or any part thereof*, is located," DA 4442 (Art. XXII(a)) (emphasis added).

New Jersey concedes that, until it filed this lawsuit, it recognized Delaware's authority to regulate cross-

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[12] *See* DA 3001 (noting that 3,000 copies were distributed and eight public hearings convened), 3016-26 ("Waterfront Development Rules and Attorney General's Opinion"), 3168 (NJ 1980 CMP), 4636-37 ("Department of Law and Public Safety"); *see also* DA 637-38, 781, 787.

boundary projects within the twelve-mile circle and has never, before this case, sought to exert exclusive jurisdiction over any structure extending into Delaware. *See* DA 4726-27 (NJ Interrog. Resp. No. 10).

4. The parties' history of cooperation

In practice, the States have cooperated over boundary-straddling projects. New Jersey's 1979 Options Report noted that "Delaware has agreed to notify Salem County of any proposed activity along the Delaware or Salem County shoreline which is subject to the [DCZA]." DA 2511. "In return, Delaware has asked Salem County to notify Delaware of any proposed development in Salem County which would fall under [DCZA] jurisdiction." *Id.*

The two States have cooperated on permitting. *See* Rep. 74-84; DE SJ Opp. 13-17. In 1991, New Jersey approved Keystone's permit on the express condition that Keystone first secure Delaware permits. *See* DA 3554; *cf.* DA 3307. An internal analysis developed by New Jersey for the project acknowledged that Keystone needed "a Coastal Zone Permit and a Subaqueous Lands Permit" from Delaware. DA 3519-20. A senior NJDEP official testified in deposition that, throughout his 27-year tenure at NJDEP, "New Jersey had regulatory authority on the New Jersey side of the boundary and Delaware had regulatory authority on the Delaware side of the boundary and any project that would cross over that boundary would need to get approvals from both states in order for the project to go forward." DA 778 (Whitney Dep.).[13] New Jersey adhered to that position even after filing this suit, by applying in 2006 to Delaware to renew the Fort Mott permit. *See* Rep. 76.

C. The Present Controversy

In 2002, BP sought permission from DNREC to construct an LNG unloading terminal named "Crown Landing" that would extend 2,000 feet into Delaware territory, with associated onshore structures in New Jersey. Con-

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[13] *See also* DA 782, 786, 790, 791, 792, 794-95, 800, 807.

struction would require dredging 1.24 million cubic yards of submerged soil, affecting 29 acres of Delaware's riverbed. *See* Rep. 19-20. Although BP indisputably could build its facility in other parts of New Jersey without encroaching on Delaware's submerged lands – including less than two miles upriver of its current preferred site – BP nonetheless has insisted on the location at Crown Landing. *See* DA 4306 (Cherry Aff. ¶¶ 9-10). On February 3, 2005, DNREC determined that the facility was prohibited under the DCZA as an "offshore bulk transfer facility" and a "heavy industry use." Rep. 20. After losing an administrative appeal, BP declined to seek court review. *See id.*

The Federal Energy Regulatory Commission ("FERC") granted BP's Crown Landing application under § 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), but conditioned its approval on, among other things, BP's "filing, prior to construction, documentation of concurrence from the DNREC that the projects are consistent with applicable Delaware law, in conformance with CZMA," as well as satisfying all New Jersey requirements. *Crown Landing, LLC*, 115 FERC ¶ 61,348, ¶ 31 (June 20, 2006), *petition for review pending, Delaware DNREC v. FERC*, No. 07-1007 (D.C. Cir.).

On January 7, 2005, BP filed an application with the NJDEP's Office of Dredging and Sediment Technology, which notified BP in a letter filed with FERC that its application was deficient under New Jersey law. The letter also informed BP that "activities taking place from the mean low water line ... outshore *are located in the State of Delaware and therefore are subject to Delaware Coastal Zone Management Regulations.*" DA 4641 (emphasis added).

BP representatives met with New Jersey officials and apparently convinced them to reverse New Jersey's decades-long policy of cooperation and acknowledgement of Delaware's regulatory authority over cross-boundary projects. *See* DA 4685-4711 (BP Privilege Log). Internal BP documents show that BP representatives communi-

cated more than 250 times with New Jersey in 2005-2006 regarding New Jersey's pleadings in this case. *See id.*

Although New Jersey has never issued the required New Jersey permits for Crown Landing to be built, it filed this suit invoking the Court's original jurisdiction. The Court appointed Ralph I. Lancaster, Jr., as Special Master, who conducted an intensive nine-month discovery process. *See* Rep. 27. After the close of discovery, both sides moved for summary judgment. The parties submitted nearly 6,500 pages of historical documents, correspondence, reports, and other materials, which the Master "read and digested" along with more than 200 pages of briefing. Oral Arg. Tr. 4 (Feb. 22, 2007).

The Master heard nearly four hours of oral argument on February 22, 2007, and issued his Report on April 12, 2007, concluding that New Jersey's authority to convey riparian lands stops at the low-water mark on the New Jersey shore. He found that the 1905 Compact preserves for riparian owners on the New Jersey shore their riparian rights, including the right to wharf out into Delaware territory. He concluded that, beyond the low-water mark, New Jersey could not exercise the full extent of its police powers or exercise "exclusive jurisdiction," and that, beyond the low-water mark, Delaware, "as the sovereign," has "overlapping jurisdiction to exercise its full complement of police powers to regulate riparian improvements extending from New Jersey's shore." Rep. 2.

The Master reasoned that New Jersey's authority to grant *lands* is limited by the boundary that this Court established in *New Jersey II*, because a State may not grant away lands to which it does not hold title. *See* Rep. 33, 42-46. By contrast, he reasoned that Article VII of the Compact preserved New Jersey's ability to grant riparian *rights* appurtenant to its own shore and beyond the boundary, because riparian rights commonly may be exercised on submerged land not owned by the riparian owner. *See* Rep. 33, 46-51. The Master concluded, however, that, even if New Jersey had jurisdiction to regulate riparian

rights associated with improvements extending from the New Jersey shore into Delaware territory, Delaware had police power jurisdiction over such improvements. *See* Rep. 52-86. That conclusion followed from an examination of this Court's cases and the two States' history of regulation. The Master's decree proposes that the "State of Delaware may exercise, under its laws, full police power jurisdiction over the construction, maintenance and use of . . . wharves and other improvements appurtenant to the eastern shore of the Delaware River within the twelve-mile circle insofar as they extend outshore of the low water mark onto its sovereign territory." Rep., App A.

SUMMARY OF ARGUMENT

I. The Special Master correctly found that New Jersey may not make grants of Delaware's submerged lands. Article VIII of the 1905 Compact codifies the longstanding rule that a sovereign will not be deemed to have granted away such lands unless it does so expressly. This Court has already held that Article VII of that Compact did not give New Jersey territorial rights in Delaware's submerged lands, and Article VIII confirms that interpretation. Article VII does no more than give each State power to grant lands that it owns, and it does not give New Jersey power to grant lands within Delaware's territory. If it did, New Jersey would be able unilaterally to change the interstate boundary set by this Court in 1935 every time it made a riparian grant beyond the low-water mark in the twelve-mile circle. This Court's boundary decision, the historical context, and the structure of the 1905 Compact provide no support for that cession of Delaware's territorial rights to New Jersey. New Jersey relies on an incorrect assumption that the Compact's reference to each State's "own side of the river" refers to the geographic half of the Delaware River adjacent to each State's shore, a position rejected by this Court when it determined that the relevant dividing line is not the river's geographic middle but the low-water mark on the eastern side.

II. The Master correctly found that Delaware retains police power jurisdiction within its territory. Riparian rights have always been subject to the sovereign's power to regulate for public safety and welfare. The New Jersey commissioners drafting the 1905 Compact were familiar with that principle, because New Jersey's Attorney General recognized it in an 1867 opinion. In enforcing its Coastal Zone Act, Delaware is lawfully exercising police powers within its sovereign territory. The DCZA is a classic exercise of the power to protect public health, safety, and lands. Moreover, Delaware has an undisputed right to regulate activity on ships within the twelve-mile circle.

New Jersey's exceptions lack merit. "Riparian jurisdiction," as used in Article VII, neither means "exclusive jurisdiction" nor confers broader police powers. New Jersey mistakenly argues that enforcement of any law affecting riparian rights constitutes an exercise of riparian jurisdiction, but that argument is not true to precedent distinguishing riparian law from general regulatory law. New Jersey also argues that it would be unworkable for Delaware to have police power jurisdiction over riparian improvements extending from New Jersey, but Delaware and New Jersey have worked together cooperatively to regulate such improvements for decades with no apparent administrability problems. Such overlapping jurisdiction over cross-boundary structures is common, as New Jersey itself asserted (and this Court agreed) in *New Jersey v. New York*, 523 U.S. 767 (1998). And the States' course of conduct since 1905 confirms that Delaware retains sovereignty and police power jurisdiction over riparian improvements located in Delaware's territory. Delaware's regulation of its coastal waters and submerged lands has long encompassed such structures, and New Jersey has consistently submitted to such regulation. New Jersey relies on statements made by Delaware at the time of the Compact, but the cited statements are consistent with Delaware's exercise of its police powers to regulate improvements in Delaware.

ARGUMENT

I. THE MASTER CORRECTLY FOUND THAT NEW JERSEY MAY NOT GRANT DELAWARE LANDS

This Court has long recognized the bedrock legal principle that control of submerged lands lies in the hands of the sovereign. The 1905 Compact codifies that foundational tenet in Article VIII, which provides that the Compact will not affect the States' territorial rights except as "expressly set forth" in the Compact. The Master correctly found that Article VII does not contain such an express grant of Delaware lands to New Jersey. Indeed, a contrary holding would override this Court's resolution of the boundary dispute in *New Jersey II*, which squarely rejected the argument that Article VII gave New Jersey territorial rights over submerged land within the twelve-mile circle:

> We are told that by [the 1905 Compact] the controversy was set at rest and the claim of Delaware abandoned. It is an argument wholly without force. The compact of 1905 provides for the enjoyment of riparian rights, for concurrent jurisdiction in respect of civil and criminal process, and for concurrent rights of fishery. Beyond that it does not go. "Nothing herein contained shall affect the territorial limits, rights, or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth."

291 U.S. at 377-78 (quoting Article VIII).

A. The 1905 Compact Codifies The Bedrock Principle That A Sovereign State Has Exclusive Jurisdiction To Grant Its Own Lands

This Court has long recognized the fundamental principle that a sovereign State has exclusive jurisdiction to grant and convey its own lands, including submerged lands. *See, e.g., Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) ("[W]hen a place is within the

boundary, it is a part of the territory of a state; title, jurisdiction, and sovereignty, are inseparable incidents, and remain so till the state makes some cession."); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) ("the laws of one State have no operation outside its territory, except so far as is allowed by comity"); *United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty."). Accordingly, the Court has held that, when a State has granted property later found to be outside its lawful boundary, the grant is invalid. *See, e.g., Coffee v. Groover*, 123 U.S. 1, 29 (1887) (discussing the rule in *Poole v. Lessee of Fleeger*, 36 U.S. (11 Pet.) 185 (1837), "that the grants of North Carolina and Tennessee were not rightfully made, because they were originally beyond their territorial boundary").

A State must use unmistakable language to cede its territorial rights. *See United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) ("[A] waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms."); *United States v. Texas*, 162 U.S. 1, 68 (1896) ("vague forms of expression" do not suffice to relinquish sovereignty). Because "[t]he dominion over navigable waters and property in the soil under them, are so identified with the exercise of sovereign powers of government," "a presumption against their separation from sovereignty must be indulged." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). *See also Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 1870 WL 5140, at *10 (N.J. 1870) (New Jersey law recognizes same principle).[14]

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[14] New Jersey asserts that this Court's cases stand for the principle that this presumption against cession of sovereign rights does not apply when a compact resolves issues between States. *See* NJ Br. 26-27 (citing *New Jersey v. New York*, 523 U.S. at 811; *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). But the cases it cites do no more than hold that the Court must interpret the Compact as it would a statute, *e.g.*, *New Jersey v. New York*, 523 U.S. at 811 – a mandate that, in this case,

As the Court held in *New Jersey II*, the 1905 Compact codifies that bedrock principle in Article VIII's requirement that any concession be "expressly set forth." *See* 291 U.S. at 377-78. An "express" concession must be "[m]ade known distinctly and explicitly, and not left to inference or implication." DA 4748 (*Black's Law Dictionary* 462 (1891)). This Court's resolution of the boundary dispute "subject to the Compact of 1905," 291 U.S. at 385, thus cannot give New Jersey territorial rights in Delaware unless the Compact expressly conferred such rights – and it did no such thing.

B. Article VII Gives New Jersey No Right To Grant Delaware Lands

The text of Article VII – that "[e]ach State may, on its own side of the river, continue . . . to make grants, leases, and conveyances of riparian lands" – contains no "express" or "unmistakable" relinquishment of title to riparian lands by either State. On the contrary, the text is most naturally read to permit each State to make grants only of land that it "own[s]." As the Master recognized, no evidence suggests that the drafters intended Article VII to permit one State to make grants of riparian land owned by the other State. *See* Rep. 40-46. Indeed, New Jersey has conceded that the Compact did not give it any ownership rights in Delaware land. *See* NJA 309a, 312a (N.J. Att'y Gen., Formal Op. No. 22) (the Compact "gave the State of New Jersey no proprietary rights in the

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requires the Court to interpret Article VII in the context of the Compact as a whole. The cases cited by New Jersey also did not involve provisions such as Article VIII in the 1905 Compact, which expressly incorporates the doctrine as a provision of the Compact. Moreover, New Jersey nowhere contests the applicability of this Court's holding in *Coffee v. Groover* that a State's grant of title to lands later found to be outside the State's boundary would be invalid. The holding of *Coffee* in the decades prior to the 1905 Compact – coupled with Article VIII's express language – more than amply demonstrates the applicability of the presumption against cession of jurisdictional rights in this situation.

soil within the twelve-mile circle," and "New Jersey has no ownership in the soil offshore of said low-water mark").

The Master also correctly found that, if Article VII allowed New Jersey to make grants of Delaware riparian lands, New Jersey could grant away from Delaware the title to all lands between the low-water mark and the middle of the river. *See* Rep. 45. This Court's own reading of the Compact, *see New Jersey II*, 291 U.S. at 377-78, rejects that very approach. Yet New Jersey's theory (at 23-24) requires the Court to read its 1934 decision "subject to the Compact of 1905," 291 U.S. at 385, to mean that the Compact permits New Jersey to alter the interstate boundary unilaterally whenever it decides to make a grant of riparian land on the eastern half of the river. The Master rightly found incredible New Jersey's suggestion that "this Court implicitly gave New Jersey the right to transfer title to lands that the Court had just concluded belonged to Delaware." Rep. 45.[15]

The structure and text of the 1905 Compact confirm the Master's interpretation. In Articles I-IV, each State received specific rights within geographically delineated areas of the disputed territory, including the right to serve process between the low-water marks on each shore and a common right of fishery within the disputed territory. Article IV gave each State "exclusive jurisdiction within said river" to enforce the concurrent fishing laws against its own inhabitants, regardless of which State's claim to the territory might later be upheld. In Articles V and VI, neither State received any rights it did not already have by virtue of the boundary. In this context, the Master correctly declined to find that Delaware, in Article VII, received nothing in exchange for New Jersey receiving the right to convey lands within the disputed

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[15] As the Master noted, at oral argument New Jersey conceded that its position was that "it has the authority to grant title to subaqueous lands west of the low water mark simply because this Court's 1935 Decree made the location of the boundary 'subject to the Compact of 1905.'" Rep. 45; *see also* Oral Arg. Tr. 19-22.

territory from the middle of the river to the low-water mark on the New Jersey shore. Nothing in this structure supports reading Article VII alone among the Compact's provisions to be a one-way street favoring New Jersey.[16]

Use of the word "continue" in Article VII to describe what the States may do further indicates that the Compact's drafters did not intend to convey either State's sovereign authority over its lands to the other State or to create new territorial rights. "Continue" means "[t]o remain in a given place or condition," while "exercise" means "[t]o put into practice" or "to use." DA 4195, 4197 (*Webster's International Dictionary* 314, 524 (1898)). Thus, the "may continue to exercise" language of Article VII does not effect a permanent *transfer* of sovereign rights from one State to the other.[17] Instead, Article VII preserved the status quo, at most grandfathering the small number of existing structures in the disputed territory so that those landowners would be protected from later claims of trespass or purpresture without reflecting any intention to surrender to New Jersey sovereign ownership of or exclusive jurisdiction within Delaware territory.[18]

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[16] Article VII's location within the Compact provides further support for Delaware's reading and the Master's conclusion that New Jersey cannot grant away the submerged lands of Delaware. Articles I-IV confer on each State certain rights concerning service of process and fishing regardless of where the boundary was to be fixed. Articles V and VI, however, indisputably gave neither State any territorial rights they did not already have on their respective sides of the boundary. Sandwiched between those Articles and Article VIII's reservation of rights, Article VII is best read as reserving each State's rights within its territory.

[17] By contrast, Article III provides that each State's inhabitants "*shall have and enjoy* a common right of fishery," and Article IV provides that each State "*shall have and exercise* exclusive jurisdiction within said river" to enforce concurrent fishing laws once enacted (emphases added). *See* DE SJ Br. 36-37 (discussing cases on "shall have" formulations in compacts as means of conferring permanent rights).

[18] Before the Master, New Jersey identified only three riparian structures built pursuant to its pre-1905 grants. *See* NJ Br. 4-5 & n.4.

The Compact's history further supports the Master's conclusion that Article VII does not give New Jersey the right to convey Delaware lands. For centuries, Delaware and New Jersey had disputed the land between the low-water mark on the New Jersey shore and the middle of the river. The States negotiated the 1905 Compact against the backdrop of two centuries of unsuccessful challenges to Delaware's title, and two notable decisions had vindicated Delaware's claim of title. *See supra* note 2. Against that backdrop, there was no reason to believe that Delaware agreed in Article VII to cede its territorial rights within the twelve-mile circle.

C. New Jersey's Exceptions Are Unpersuasive

1. *Virginia v. Maryland* is inapposite

Throughout this litigation, New Jersey has contended that *Virginia v. Maryland*, 540 U.S. 56 (2003), supported its entitlement to grant away Delaware's submerged lands. Special Master Lancaster – the same master whose recommendations were accepted by this Court in *Virginia v. Maryland* – properly found New Jersey's arguments unpersuasive. New Jersey contends (at 24-27) that no presumption against defeat of a State's title applies, because Delaware's title was disputed at the time of the Compact. *See also* BP Br. 12-13. That argument fails because Article VIII of the 1905 Compact made the presumption against forfeiture of jurisdictional powers binding upon both States. *See supra* pp. 18-20. The 1785 Virginia-Maryland Compact contained no such provision.

The Master also correctly rejected New Jersey's reliance on *Virginia v. Maryland* because of critical differences in "the unique language of the compact and arbitration award involved in that case." Rep. 64 n.118. The 1785 Compact between Virginia and Maryland provided that "'[t]he citizens of each state respectively shall have full property in the shores of the Potowmack river

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Two of those structures were inconsequential, and none was inconsistent with Delaware common law. *See* DA 4453.

adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.'" 540 U.S. at 66 (quoting Article Seventh). Examining the various provisions of that compact, the Court observed that the Article Seventh "privilege of making" wharves by the "citizens of each state" "was not explicitly subjected to any sovereign regulatory authority," whereas the fishing right in Article Eighth "was subjected to mutually agreed-upon regulation." *Id.* at 66-67; *see also id.* at 67 ("Other portions of the 1785 Compact reflect this design."). The Court found "that these differing approaches to rights" "indicate that the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." *Id.*

As the Master explained, the 1905 Compact contains no "comparably clear language" giving New Jersey jurisdiction that encompassed all regulatory oversight or was exclusive of Delaware's jurisdiction. Rep. 65 n.118.[19] The 1785 Compact also declared that Virginia residents "shall have" jurisdictional rights, in contrast to the "may ... continue" language of Article VII, and it did not limit the privilege of building wharves and improvements to each State's "own side" of the river, as does the 1905 Compact. Finally, *Virginia v. Maryland* did not concern the conveyance of another State's land to a private party, such as New Jersey wishes to effect here by granting portions of Delaware to BP.

New Jersey asserts (at 26) that the Master misread Article VIII and mistakenly insisted on "heightened clarity."

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[19] BP argues (at 11) that the documents in *Virginia v. Maryland* contained no reference to "riparian jurisdiction," yet granted Virginia exclusive jurisdiction over riparian structures extending across the boundary, free from Maryland's regulation. The Master, however, correctly found the 1905 Compact's reference to "riparian jurisdiction" to limit each State's jurisdiction to the granting of riparian rights, rather than to impair police powers to regulate activities generally.

But he merely applied Article VIII's plain language to conclude that Article VII could not affect Delaware's territorial rights unless it expressly so provides, which it does not. New Jersey substantially ignored Article VIII in briefing before the Master and now does not even attempt to show that Article VII contains an "express" concession by Delaware to confer authority on New Jersey to grant riparian lands within Delaware territory.

2. New Jersey's symmetry arguments lack merit

New Jersey claims (at 40) that the Compact is organized in a "rigorously symmetrical" fashion and that the Master's reading must be wrong because it gives Delaware the power to control riparian development from the New Jersey shore, while New Jersey does not have the power to control development from the Delaware shore. Reading the Compact, as the Master did, to give each State authority over lands within its own boundary is "symmetrical." The axis of symmetry is the boundary between the States and not, as New Jersey would have it, a line down the middle of the river – a line that this Court determined has no legal significance within the twelve-mile circle. New Jersey may control development in its territory, from its shore up to the low-water mark (its "own side"), and may assert jurisdiction over developments from the Delaware shore that extend into New Jersey territory. But neither State may control development in the other's territory.[20]

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[20] The Master misunderstood Delaware to be arguing that, because the river up to the low-water mark is on Delaware's side of the boundary, New Jersey "has no 'side' of the River on which to exercise any riparian rights or riparian jurisdiction." Rep. 36. On the contrary, Delaware has always agreed with the Master that, "after [*New Jersey II*], New Jersey still owns down to the easterly low water mark." "[s]o New Jersey still has a side." *Id.* That side includes "not only an 'edge' or 'border' along the River . . . . but also a portion of the River itself, between the low and high water marks." Rep. 37-38 n.82. New Jersey thus may grant riparian lands and riparian rights extending up to that mark.

In the same vein, New Jersey argues (at 31-32) that the Compact accords "equal grants of jurisdiction to the parties," citing Articles I and II, which give New Jersey jurisdiction over the "eastern half" of the river and Delaware jurisdiction over the "western half." But those Articles illustrate that the drafters were perfectly capable of permitting each State to exercise jurisdiction in a particular geographical area, something they chose *not* to do in Article VII. *See supra* pp. 4-6.

New Jersey also argues (at 31) that the Court need not interpret the Compact to equalize the burdens and benefits of a contractual provision. But that argument contradicts its assertion (at 40) that the Compact is "rigorously symmetrical." In any event, Delaware's commissioners had no reason to give New Jersey sovereignty over disputed lands within the twelve-mile circle without receiving anything in return. *See supra* pp. 21-23.

3. Article IX does not support New Jersey

Nothing in Article IX, which provides that the Compact would "become binding in perpetuity upon both of said States," supports New Jersey's position. Article IX neither increases nor decreases the scope of the provisions in the eight substantive Articles of the Compact; it merely provides that the Compact as a whole will be binding in perpetuity, as opposed to expiring at any given time. In the same sentence, Article IX also states that, upon ratification, the litigation between the States "shall be discontinued . . . without prejudice." Taken together, the two clauses mean that the Compact as a whole shall be binding and that the rights reserved therein shall be preserved for litigation at a later date if necessary. Given the States' decisions in Articles I-IV to confer jurisdiction on each other irrespective of the ultimate boundary determination, the existence of Article IX – making the agreement "binding in perpetuity" – sheds no light on the meaning of those Articles (V, VI & VII) that expressed no intent to surrender to New Jersey for all time jurisdiction

over riparian structures that were conclusively determined to fall within Delaware's boundary.

4. New Jersey's assumption that "side" means "half" of the river is flawed

For the most part, New Jersey is careful to avoid defining its "own side" of the river as the eastern half. Yet the only way New Jersey can prevail in this lawsuit is for its "own side" to extend past the boundary line, and the only way for its theory of riparian jurisdiction to achieve its objective of permitting BP to construct its LNG bulk transfer facility is for the extension of its "side" to go all the way to the navigable channel in the middle of the river. *See* Oral Arg. Tr. 11, 19-21, 57-58; NJ Br. 32 (arguing that its authority "to make the necessary grants of riparian rights and lands past the low water mark" must override Delaware's "police power on the eastern half of the river"). That position, however, was explicitly rejected by this Court in connection with the boundary decision of 1934. *See New Jersey II*, 291 U.S. at 385.

At the time of the Compact, courts, legislatures, and litigants referred specifically to the "middle of the river" or used similar language when they wanted to designate a river's geographical half, rather than referring merely to a State's "own side" without defining the limits of that "side." For example, in *New Jersey I*, New Jersey repeatedly referred to the "middle" of the river, or "easterly" of the "middle" of the river, in its boundary claims. *See* DA 20 (1877 Complaint). Similarly, during the hearings conducted by the Court-appointed commissioner, New Jersey's Attorney General Robert McCarter – one of the 1905 Compact's negotiators – asserted that New Jersey owns "the bed of the Delaware River East of the middle line thereof." DA 1141; *see also* DA 1143 ("[s]uch claim to the centre of the river"). Those usages are consistent with the way each State's statutes had asserted title. New Jersey statutes provided that "the boundary lines of the counties of Salem, Cumberland and Cape May, are hereby declared to be the main ship channel of the river and bay of

Delaware adjoining said counties respectively." DA 859 (1821 N.J. Laws p. 6, § 1). Delaware used similarly precise language, defining Delaware's boundary as the "low-water mark on the eastern side of the river Delaware within the twelve-mile circle from New Castle." Revised Code of Delaware, 1874, ch. 1, § 2.

Numerous pre-1905 cases from New Jersey likewise referred to the "middle" of a river to denote a boundary between New Jersey and other States, rather than using a phrase such as "own side of the river" to denote jurisdiction or title all the way to the middle of a river.[21] The same is true of the 1834 New Jersey-New York Compact, which was the subject of much litigation at the turn of the 20th century.[22] As the Master found, the textual evidence shows that the 1905 Compact borrowed language from the 1834 Compact.[23] The 1834 Compact had used precise phrases to describe the geographic scope of each State's jurisdiction. The 1905 Compact used similar precision in certain Articles, but not in Article VII.

Given that textual, historical, and comparative evidence, Article VII's reference to each State's "own side of

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[21] *See, e.g.* (all emphases added): *New York, Lake Erie, & W.R.R. Co. v. Hughes*, 17 Vroom 67, 1884 WL 7630, at *2 (N.J. Sup. Ct. 1884) ("*middle of the Hudson river*"); *Lehigh Valley R.R. Co. v. Mutchler*, 13 Vroom 461, 1880 WL 7765, at *2 (N.J. Sup. Ct. 1880) (taxation "for that part of its bridge over the Delaware river [from Pennsylvania and New Jersey] which is *east of the middle line of the river*"); DE SJ Br. 33 n.39 (numerous additional cites).

[22] *See, e.g.* (all emphases added): DA 886-87 (Arts. 3(1) ("exclusive right of property in and to the land under water lying *west of the middle* of the bay of New York"), 3(3) ("exclusive right of regulating the fisheries on the *westerly side of the middle* of the said waters"); *Central R.R. Co. v. Mayor of Jersey City*, 56 A. 239, 243 (N.J. Sup. Ct. 1903) ("Article 1, in clear and explicit language, fixed the boundary line between the states as the *middle of the Hudson river* and of the Bay of New York."), *aff'd*, 61 A. 1118 (N.J. 1905) (per curiam), *aff'd*, 209 U.S. 473 (1908).

[23] *See* Rep. 65-68 & App. J (table comparing 1834 and 1905 compact provisions).

the river" does not refer to the geographic half of the river adjacent to each State's shore, but to the "side" owned by each State. As the Master correctly concluded, New Jersey's "side" of the river consists of the land along its shoreline as well as the "portion of the River . . . between the low and high water marks." Rep. 37 n.82. New Jersey is free to grant riparian lands and rights within its territory, but it may not grant lands located in Delaware's territory, and any *rights* it grants beyond its territory are subject to Delaware's regulation.[24]

II. DELAWARE MAY EXERCISE POLICE POWER JURISDICTION OVER RIPARIAN IMPROVEMENTS LOCATED IN DELAWARE

Even if the 1905 Compact grants New Jersey *riparian* jurisdiction that extends into Delaware territory, the Master correctly found that Delaware retains territorial rights and police power jurisdiction within its own territory. Riparian jurisdiction – *i.e.*, jurisdiction to grant and define riparian rights – has always been subject to the sovereign's exercise of its police powers. This Court has

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[24] The Master found that New Jersey may grant riparian *rights* (as opposed to land) extending into Delaware, because riparian owners' *rights* (to wharf out, etc.) may extend over land that they do not own. Although that recommendation is inconsistent with the notion that a State's sovereignty extends throughout its territory, the Master's recommended finding lacks practical effect. As the Master correctly determined, any such rights are always subject to the sovereign's exercise of its police powers. *See* Rep. 33-34, 51-86; *see also infra* Part II. Moreover, as a practical matter, all cross-boundary riparian rights are currently governed by separate agreements between the parties, or by federal law, or are now obsolete. For example, even within the Compact itself, fishing rights would be governed by the more specific provisions of Article V, while discharges and withdrawals of water are governed by the interstate Delaware River Basin Commission's permitting process and by federal regulations, *see* DA 4319-20 (Hansen Aff. ¶¶ 2-4) (describing Environmental Protection Agency and DRBC discharge rules); Delaware River Basin Water Code (Aug. 14, 2007), *available at* www.state.nj.us/drbc/regs/watercode_092706.pdf. Ice-cutting on the Delaware River is obsolete, and the record indicates no disputes over bathing in the river.

recognized the distinction between riparian rights and territorial rights in the 1905 Compact, emphasizing that the Compact provided for "the enjoyment of *riparian* rights" without going "[b]eyond that" to "'affect the *territorial* limits, rights, or jurisdiction of either State.'" *New Jersey II*, 291 U.S. at 377-78 (quoting Art. VIII) (emphases added). Thus, even if New Jersey could authorize a wharf to be built into Delaware's territory, Delaware retains police power to regulate activities on that wharf. New Jersey's argument that Article VII grants it "exclusive" jurisdiction to regulate wharves on Delaware territory is unpersuasive for a number of reasons, principally because it improperly substitutes "exclusive" for "riparian" in the phrase "riparian jurisdiction."

A. Riparian Rights Are Subject To The State's Exercise Of Its Police Powers

1. The Master correctly interpreted the phrase "riparian jurisdiction" in the context of riparian rights. *See* Rep. 46-47. Although both States acknowledge that "riparian jurisdiction" was not an acknowledged term in 1905, riparian rights were well-defined. They included rights to access navigable waters and to use waters appurtenant to riparian property, subject to the police power. *See* 1 *Farnham* 279-80. As the Master concluded, the adjective "riparian" as applied to "jurisdiction" cannot be stripped of the meaning that it has when modifying "rights." Article VII's reference to "riparian" jurisdiction indicates that this jurisdiction relates to the oversight and exercise of riparian rights, not that it is an exclusive grant to one State of police powers to be exercised within the territory of the other State. *See* Rep. 55-58. And, indeed, New Jersey implicitly concedes as much (at 32-33) when it defines "riparian rights" without contending that such rights negate a State's typical police powers.

Riparian rights are private rights or privileges associated with property. *See, e.g.*, 1 *Farnham* 302 ("the riparian right of access to the water was property"). Thus, "the owners of land abutting on bodies of water are accorded

certain rights by reason of their adjacency which are *different from those belonging to the public generally*." *Id.* at 278 (emphasis added). But those private property rights, including the right of shoreline property owners to access the navigable portion of a river, have always been "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871); *see also Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 64-65 (1873); Restatement (Second) of Torts § 856 cmt. e (explaining that, absent "conflict with federal action or policy," "a state may exercise its police power by controlling the initiation and conduct of riparian and nonriparian uses of water"). New Jersey likewise followed those principles.[25]

After the exercise of legitimate rights by the riparian owner, "there remains a residuum of common or public ownership that, under our system, rests in the state as a trustee for all the people." *McCarter v. Hudson County Water Co.*, 65 A. 489, 496 (N.J. 1906), *aff'd*, 209 U.S. 349 (1908) (Holmes, J.); *see also Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 1882 WL 2713, at *10 (1882) ("[R]iparian rights are always subject to the state regulation."). Riparian rights "are always subordinate to the public rights, and the state may regulate their exercise in the interest of the public." 1 *Farnham* 284. The right to wharf out is likewise subject to the exercise of police powers. *See Yates*, 77 U.S. at 504 ("[t]his riparian right is property, and is valuable, and . . . must be enjoyed in due subjection to the rights of the public").

2. New Jersey's 1905 Compact commissioners would have recognized the sovereign's police power to restrict private riparian rights to protect the public safety. An

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[25] *See, e.g., Gough v. Bell*, 22 N.J.L. 441, 1850 WL 4394, at *17 (N.J. Sup. Ct. 1850) (Green, C.J.), *aff'd*, 23 N.J.L. 624, 1852 WL 3448 (N.J. 1852); *see also* New Jersey cases cited at DE SJ Br. 50 n.58.

1867 New Jersey Attorney General opinion concluded that, under New Jersey law, riparian rights were "'confined to uses naturally incidental to the right to occupy the shore, such as the right of passage and landing, of egress and ingress to and from, and the general use of the docks and wharves.'" Rep. 59 (quoting DA 909 (N.J. Att'y Gen., Op. Concerning Riparian Rights)). The opinion found that such rights "were not absolute, but rather were subject to varying degrees of regulation by the State," which retained the power to override "riparian rights for 'public uses,'" including "'the essential interests of governmental strength and public safety.'" *Id.* (quoting DA 910).

According to that same opinion, the State could also regulate riparian rights for other public purposes, including turnpikes and railroads, but in such cases the State would have to exercise its eminent domain powers and compensate the riparian owner. *See* Rep. 60. Thus, the sovereign could restrict the location of a pier if a public turnpike required doing so, but just compensation would be due the riparian owner. When the State's regulation impaired the riparian right for a public safety purpose, no compensation was required. *See id.* In view of that history of riparian rights, "riparian jurisdiction" means the State's jurisdiction to define the scope of and to grant the special private rights that are unique to riparian proprietors and that are not shared by the public at large. *See* DA 909 ("rights of the 'riparian owner' are not *common* rights . . . [but] *private* rights"). The public's rights have never been considered to be riparian rights. Accordingly, the scope of riparian jurisdiction in Article VII is defined by the scope of those private riparian rights – such as the right to wharf out to access navigable waters – and does not alter in any respect the public's rights in those waters or submerged lands. New Jersey's compact drafters – two of whom had been New Jersey Attorneys General – would have been familiar with their predecessor's detailed opinion on the ability of state power to override riparian rights in New Jersey. *See* Rep. 61.

New Jersey attempts (at 38) to minimize the import of the 1867 opinion, arguing that it was "superseded" two years later by a new statutory scheme, but its argument misses the point. The 1867 opinion addressed the fundamental relationship between the rights of riparian owners and the powers of the sovereign that owns "the lands covered by the navigable waters." DA 906. That opinion established the legal principles pursuant to which the subsequently enacted statute – which did *not* amend the Attorney General's opinion, but rather implemented the State's powers as described in that opinion – could operate. The 1867 opinion authoritatively illuminates what New Jersey's chief legal officer understood to be the contours of riparian jurisdiction prior to the 1905 Compact's drafting – and New Jersey's interpretation of the Compact now cannot be squared with that opinion.

B. Delaware Seeks To Exercise Its Police Powers

1. Delaware's Coastal Zone Act is a classic exercise of police powers. Regulating emissions into and activities on a sovereign's water "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). The DCZA carries out Delaware's overarching authority to protect public health and safety and "to protect the atmosphere, the water, and the forests within its territory," *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), by prohibiting additional bulk transfer facilities in its coastal zone. In accord with *Hudson County*'s holding on the permissible scope of police powers, the DCZA's legislative purpose is "to control the location, extent and type of industrial development in Delaware's coastal areas" to "better protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism." Del. Code Ann. tit. 7, § 7001. That functional prohibition of certain activities on riparian improvements does not make it a riparian law or an exercise of riparian jurisdiction. *See Cummings*, 188 U.S. at 426-

27 (distinguishing between federal riparian permission and state police powers).

New Jersey claims (at 40) that allowing Delaware to determine what may be unloaded on cross-border wharves threatens New Jersey's ability to promote commerce, and thus could not have been contemplated by the Compact's drafters. But New Jersey offers no evidence the drafters intended to confer on *New Jersey* exclusive authority over activities in Delaware that threaten Delaware's ability to protect its citizens' health and safety. In any event, Delaware seeks no advantage over New Jersey – the same laws preclude BP's activities throughout Delaware's coastal territory.[26]

2. Even if New Jersey somehow had a right to prevent Delaware from exercising its police powers with respect to a wharf on Delaware territory, Delaware unquestionably may regulate ships outshore of the low-water mark within the twelve-mile circle. The DCZA prohibits bulk transfers from ships as well as from wharves. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985) (holding that the DCZA applies to vessel-to-vessel transfers as well as to vessel-to-shore transfers, and noting that "[t]he danger of pollution and industrialization to the Delaware Coast is the same"). Delaware

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[26] *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 406-07 (3d Cir. 1987) (upholding the DCZA against a Commerce Clause challenge because Delaware applies its coastal zone laws even-handedly throughout the river). BP suggests incorrectly (at 1-3) that FERC has determined BP's project should be built at the proposed site. In fact, BP is currently assessing other potential locations outside the twelve-mile circle, and thus outside of Delaware's regulatory purview. FERC has elected not to file an *amicus* brief supporting BP in this case, thus suggesting that Crown Landing's preferred site in Delaware is not important to the agency. Moreover, FERC recently emphasized to the D.C. Circuit that its approval of the Crown Landing project was "conditional, but not final," pending further approvals, including Delaware's approval. *See* Motion of Respondent FERC To Dismiss or Alternatively To Hold in Abeyance Petition for Review at 1, 5, *Delaware DNREC v. FERC*, No. 07-1007 (D.C. Cir. filed Mar. 1, 2007).

has the right (subject to applicable federal laws) to impose pilotage requirements for vessels passing through its waters and to impose regulations on vessels tied to wharves on Delaware territory. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 159-60 (1978) (discussing local pilotage rules); *Huron*, 362 U.S. at 441-42 (holding that local smokestack ordinance applied to ships in port). Delaware's denial extended to the portion of BP's proposed bulk transfer facility piping on the supertankers from which the LNG would be offloaded. *See* DA 3804. That denial cannot violate the 1905 Compact, because regulating ship-board activities is not "riparian jurisdiction."

The 1834 New Jersey-New York Compact distinguished between jurisdiction over wharves and authority over ships fastened to them, providing that "New Jersey shall have the exclusive jurisdiction of and over the wharves, docks, and improvements, made and to be made on the shore of the said state; and of and over all vessels aground on said shore, or fastened to any such wharf or dock." DA 887 (Art. 3(2)). Article I of the 1905 Compact permits New Jersey to serve process on a ship fastened to a wharf emanating from New Jersey but does not permit New Jersey to exercise other forms of jurisdiction over ships. The 1905 Compact thus did not diminish Delaware's power to regulate the activities of ships within its waters, even if the ships dock at a wharf that crosses the border from New Jersey into Delaware.

C. New Jersey's Exceptions Lack Merit

1. "Riparian" is not "exclusive" jurisdiction

The Master correctly found that "riparian jurisdiction" does not mean "exclusive jurisdiction." Rather, the word "riparian" is a "limiting modifier" on the term "jurisdiction," such that the phrase "riparian jurisdiction" cannot be read to confer "broader police powers to regulate all activities that might be conducted on riparian improvements" that cross the boundary line. Rep. 57.

The Master interpreted Article VII in light of the 1905 Compact as a whole and other compacts to which New Jersey was a party. *See* Rep. 62-68. The 1905 Compact used the word "exclusive" only in Article IV, and then only to give each State "exclusive jurisdiction within said river to arrest, try, and punish its own inhabitants" for violating fishing laws. Had the drafters intended to give New Jersey exclusive jurisdiction over riparian improvements extending into Delaware, and to forbid Delaware from exercising its police powers over such structures, they could have used the term "exclusive" in Article VII.[27] Similarly, the 1834 New Jersey-New York Compact – on which the 1905 Compact's drafters clearly drew – confirms that New Jersey specified when it intended jurisdiction to be exclusive. That compact gave New York "exclusive jurisdiction" over the waters and New Jersey "exclusive jurisdiction" over wharves (subject to New York's health and quarantine laws). *See* Rep. 66-67 & App. J.[28]

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[27] New Jersey argues (at 27) that Article VII grants "*exclusive* jurisdiction to each State on its side of the river, not . . . shared jurisdiction." But "exclusive" jurisdiction on New Jersey's "own side of the river" is not exclusive jurisdiction in Delaware. *See supra* pp. 27-29.

[28] The 1783 Compact between New Jersey and Pennsylvania gave the two States "concurrent" jurisdiction over the waters of the Delaware River between their shores, but provided that certain vessels would be "exclusively within the jurisdiction" of one State or the other, depending upon the vessel's location. *See* DA 4403 (Art. II).

The "exclusive" language in the 1834 Compact between New Jersey and New York proved determinative in subsequent litigation. *See New York v. Central R.R. Co. of New Jersey*, 42 N.Y. 283, 304 (1870) (holding that New Jersey's "exclusive jurisdiction" over wharves precluded New York from asserting jurisdiction over such structures for purposes of declaring them a nuisance). Nonetheless, even New York's "exclusive jurisdiction" over certain submerged lands and water to the low-water mark on the New Jersey side of the Hudson River – which the Compact declared were owned by New Jersey – could not interfere with New Jersey's right, as the sovereign owner of those lands and water, to tax them. *See Central R.R.*, 56 A. at 243-44.

New Jersey next relies (at 30) on the fact that Article VII gives it "riparian jurisdiction of every kind and nature." But that phrase is best understood as jurisdiction over all types of riparian rights, from fishing and bathing to water extraction and wharfing out. New Jersey's reading would drop the modifier "riparian" and transform the phrase into "*jurisdiction* of every kind and nature." A State may exercise jurisdiction over all types of riparian rights without impairing an adjoining State's exercise of non-riparian jurisdiction. *See infra* pp. 39-41. Moreover, New Jersey has presented no evidence that, before this case, it ever sought to assert exclusive jurisdiction over wharves extending into Delaware. *See* DE SJ Reply Br. 9-10 (summarizing record before the Master). Finally, BP's argument (at 10) that the States could not have intended to create "concurrent" jurisdiction because the Compact uses the word "concurrent" in three other places is wrong. The Master did not conclude that the Compact gave the States concurrent *riparian* jurisdiction, but rather that it gave each State riparian jurisdiction within its own boundary, subject to the general police powers of the sovereign that owns the submerged lands where riparian activities occur.

2. *Hudson County* does not support New Jersey

New Jersey does not dispute that the right to wharf out is subject to regulation to protect other public interests, but it claims (at 36-41) that such regulation is itself an exercise of "riparian jurisdiction." That argument – newly minted for its exceptions – rests on a misreading (at 38-39) of *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), which concerned a New Jersey statute prohibiting the transport of New Jersey's fresh waters to another State. A water company asserted that the statute violated its riparian rights. *See id.* at 353-54. Writing for the Court, Justice Holmes recognized that the case pitted "the private right of property" against "the police power" and held that the State, as "representative of the interests

of the public," may, on a "principle of public interest and the police power," limit the permissible activities of riparian proprietors "to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Id.* at 355-56. The Court made clear that regulation of the water company's use of water obtained through riparian rights was an exercise of the State's police powers, not an exercise of jurisdiction to define or to grant riparian rights. *See id.* at 355.

New Jersey's argument that "'the limits set to property' are not isolated from the property 'right'" but "determine . . . the extent of that . . . 'right,'" Br. 39 (quoting 209 U.S. at 355), is deeply flawed. The Court famously observed that public-interest limitations on a property right are based on "principles of policy which are *other* than those on which the particular right is founded," 209 U.S. at 355 (emphasis added) – *i.e.*, enforcement of non-riparian law is not an exercise of riparian jurisdiction.

In its exceptions, New Jersey makes an argument not previously made to the Master, contending (at 39) that "[s]etting limits on how property can be used is itself an integral part of defining what property rights are" and that "the right to use property and the boundaries of that right are functionally inseparable." In New Jersey's view, any law limiting how riparian "property can be used" is a riparian law, because it defines riparian rights. That view is overly broad and unpersuasive, turning all law into "riparian law." As explained above (*supra* pp. 30-31), riparian law is a subset of property law and thus sets out the rights enjoyed by owners of property adjacent to navigable waters but does *not* set out the rights of the general public. Criminal, environmental, and other regulations limit the use of real property, riparian and otherwise, but that does not make such laws subsets of riparian law insofar as they affect riparian rights.

Many cases have rejected New Jersey's submission and distinguished between riparian property law and general

regulatory law. In *Cummings v. City of Chicago*, 188 U.S. 410, 427-31 (1903), the federal government regulated riparian landowners' wharfing out through a permitting scheme. An owner who complied with that scheme found its project blocked for lack of a permit from the City of Chicago. The owner argued that the city permitting scheme should be preempted. The Court held that compliance with the federal government's regulation of riparian rights did not strip the State of its police powers over the river: "[The] river, it must be remembered, is entirely within the limits of Illinois, and the authority of the state over it is plenary." *Id.* at 427. The fact that the federal government possessed and exercised *riparian* jurisdiction did not mean that "no jurisdiction or authority whatever remains with the local authorities." *Id.* at 426.[29] The Master relied on numerous federal and state cases reaching similar conclusions about the limitations on riparian rights, *see* Rep. 50 & n.98 (citing cases), and New Jersey's position cannot be squared with that extensive precedent.[30]

3. The right to wharf out does not include a right to unload any particular cargo

Because the riparian right to wharf out is a general right to access navigable waters subject to the exercise of police powers, it does not include the right to unload any particular cargo or to engage in any particular activity on

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[29] *See also Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 149-51 (Mich. 1960) (relying on *Cummings* and *Hudson County* to hold that a State could exercise its police powers over the use made of a wharf, even though the federal government had authorized the wharf's creation).

[30] New Jersey also argues (at 36) that, even if Delaware may exercise its police powers in its territory, it may not do so in a way that "undercut[s]" New Jersey's riparian authority. But "riparian jurisdiction" cannot be jurisdiction to authorize all activities that happen to take place on a pier or wharf, even if the sovereign would otherwise deem such activities unlawful.

a wharf.[31] As New Jersey has admitted, none of its riparian grants permitting construction of wharves authorized any specific activities or cargo to be handled on those wharves, *see* DA 4147-62 (NJ Admissions Response Nos. 1-3, 5-32), nor may the recipient of a New Jersey riparian grant conduct a business activity on a wharf without complying with other applicable law, *see id.* Restrictions on activities on wharves come from non-riparian sources of law. For example, the offloading of drugs, alcohol, cigarettes, pesticides, and natural gas may be regulated and restricted, just as they may be regulated when the cargo is carried over land. *See* Rep. 55-56.

Although ownership of property confers a general right to use that property, an owner may not violate zoning laws or carry on particular business activities without complying with other regulatory and permitting requirements. Likewise, there is no riparian right to drill for oil or valuable minerals from a wharf, as New Jersey concedes (at 36 n.12), or to engage in gaming activities or prostitution thereon, merely because of a general right to use the wharf. Nor is there a riparian right to harvest oysters and other shellfish merely because the wharf is adjacent to or over shellfish beds. *Cf.* 1905 Compact Art. VI. Laws that regulate other uses of a wharf or pier are not "riparian laws" whenever they are enforced against conduct occurring on a wharf.

New Jersey erroneously claims (at 32-33) that authority over "riparian lands and rights" necessarily encompasses "complete authority to determine what riparian improvements – in particular, what piers and wharves – could be built on its shores, even past the low-water mark." The

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[31] *See, e.g., Shively v. Bowlby*, 152 U.S. 1, 40 (1894) ("a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public"); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 445-46 (1892) (same).

grant of a right to wharf out would not, for example, foreclose a sovereign's determination that a certain wharf could not be built because it impeded navigation, *see, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. 411, 419 (1926), or violated non-riparian safety laws. Even if New Jersey has "complete authority" to determine what piers and wharves may be built, that is not exclusive authority over the permissible uses of those wharves and the activities of ships that dock on those wharves.[32]

The only riparian expert in this case – Professor Joseph L. Sax, a preeminent authority in water law for more than 40 years – has likewise concluded that "riparian jurisdiction" as used in Article VII cannot be read to mean general police power jurisdiction, but "would have been limited to the administration of the property aspects of riparian landownership on the New Jersey shore, and not to the far more extensive and significant administration of public rights and the general police power." DA 4392-93; *see generally* DA 4279-4302 (Sax Rep.).

4. Concurrent jurisdiction over wharves is administrable and rooted in the historical relations of the two States

New Jersey argues (at 36-41) that Delaware's exercise of police powers over improvements and ships within its waters would be impractical and "unnatural," and that it therefore must have exclusive jurisdiction over wharves extending into Delaware. That argument has no basis in the Compact's text or the States' experience.

First, Articles IV and V of the 1905 Compact provide for concurrent jurisdiction over fishing. Articles I and II (with certain exceptions) also permit each State to exercise concurrent jurisdiction throughout the river to serve

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[32] *Cf. Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 511, 1866 WL 89, at *5 (N.J. 1866) ("[e]xtraordinary, unusual modes of use, no matter how convenient they may be, are not annexed as incidents in law" to the riparian right to wharf out).

process. Thus, there is no reason to assume the drafters meant to give New Jersey "exclusive jurisdiction" over activities on wharves without saying so explicitly – especially given that New Jersey's 1834 Compact uses the term "exclusive" as to wharves when that was intended. Article VII's use of "*continue to* exercise riparian jurisdiction" further indicates the States had no intent for "riparian jurisdiction" to encompass a sovereign's police powers over activities on its lands.

Second, New Jersey's previous compacts with New York and Pennsylvania established rules giving each State jurisdiction over certain subjects within the same territory. In the 1834 Compact, New Jersey got exclusive jurisdiction over wharves and vessels fastened thereto, with the exception that New York's health and quarantine laws would apply. And the 1783 New Jersey-Pennsylvania Compact gave each State "concurrent jurisdiction within and upon the water, and not upon the dry land, between the shores of said river." DA 4403 (Art. II).

Third, New Jersey agreed in 1989 that the DCZA applies to boundary-straddling public wharves associated with river crossings between the States. *See supra* p. 12. If New Jersey believed that the 1905 Compact precluded Delaware's authority, it would not have done so. That recent action further confirms that Delaware's regulation of activities on wharves extending from New Jersey is workable. *Fourth*, it is well-settled that structures crossing the river, such as bridges, tunnels, ferries, pipelines, and submarine cables, must satisfy the laws of both States, so States routinely exercise such concurrent powers.[33]

Fifth, New Jersey recently represented to this Court that concurrent jurisdiction over Ellis Island – indeed,

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[33] *See, e.g.*, DE SJ Br. 25 (citing *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 622 (1899)); *Bridge over Delaware River v. Trenton City Bridge Co.*, 13 N.J. Eq. 46, 1860 WL 5184, at *3 (N.J. Ch. 1860); *Lehigh Valley*, 1880 WL 7765, at *2; NJ SJ Br. 45 n.24.

over *a building divided by the state boundary* – presented no insurmountable practical problems.[34] Wharves are indistinguishable. *Sixth*, this Court has held that federal and state governments may exercise concurrent jurisdiction over wharves.[35] The Court read an 1899 statute to preserve States' police powers over wharves even when federal authorities established different bulkhead lines.

Finally, *Virginia v. Maryland* does not suggest that concurrent jurisdiction is unworkable. New Jersey claims (at 42) that case establishes that New Jersey must have exclusive jurisdiction over wharves and piers extending into Delaware territory to enjoy riparian ownership of its own shore. But the question here is whether Delaware may enforce its environmental laws when riparian improvements from New Jersey's shore extend past the boundary – not whether New Jersey may authorize those developments. Moreover, the compact and arbitration award interpreted in *Virginia v. Maryland* contained no territorial limitation, whereas the 1905 Compact limits each State's authority to "its own side of the river" – a crucial boundary reference absent in *Virginia v. Maryland*.

In sum, even if New Jersey's riparian jurisdiction could extend beyond its boundary, New Jersey would only have

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[34] *See* DA 4416 (NJ Reply Br., *New Jersey v. New York*, No. 120, Orig.); *see also New Jersey v. New York*, 523 U.S. at 811. New Jersey in that case also relied on other examples of its multi-state cooperation, including since 1921 "through the Port Authority of New York and New Jersey" and since 1961 through "the Delaware River Basin Commission," of which Delaware is also a member. DA 4416; *see also* www.state.nj.us/drbc (DRBC website listing members).

[35] *See Cummings*, 188 U.S. at 428-30 ("When [the state's] power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield."); DA 4289-90 (Sax Rep. ¶ 26) (discussing *Cummings*); *see also Huron*, 362 U.S. at 442 ("In the exercise of that [police] power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

the rights to authorize the erection and maintenance of wharves consistent with the DCZA, to grant or lease the lands necessary to construct them, to determine rules for adjudicating competing claims of upstream and downstream riparian owners on its shore, and to regulate accretion and erosion of riparian lands.[26] Delaware would retain the authority to exercise its general police powers, independent of property holders' riparian rights, to protect public rights in the Delaware River. *See Wedding v. Meyler*, 192 U.S. 573, 585 (1904) (Holmes, J.) ("The conveniences and inconveniences of concurrent jurisdiction both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken.").

5. The States' conduct since 1905 supports Delaware's exercise of its police powers within Delaware

The Master correctly found that the States' course of conduct since ratification confirms that Delaware may exercise police power jurisdiction over projects extending beyond the low-water mark from New Jersey. *See* Rep. 68-86. *First*, Delaware's lack of regulatory involvement in riparian development from either shore from 1905 to 1961 is hardly a concession that it lacked authority to regulate development within its territory. *See Georgia v. South Carolina*, 497 U.S. 376, 389 (1990) ("Inaction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a

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[26] *See, e.g., Keyport & Middletown Point Steamboat Co. v. Farmers Transp. Co.*, 18 N.J. Eq. 13, 1866 WL 88, at *5 (N.J. Ch.) (holding that wharf owner has no right to restrain adjacent riparian proprietor from constructing a wharf such that first occupier could no longer make wide turns in front of the adjoining property to dock more efficiently), *aff'd*, 18 N.J. Eq. 511, 1866 WL 89 (N.J. 1866); *Costigan v. Pennsylvania R.R. Co.*, 23 A. 810, 812 (N.J. Sup. Ct. 1892) ("To construct a mill-dam upon one's own property is a perfectly lawful act; but if, by means of such dam, the natural current of the water is obstructed and thrown back upon the lands of another, it becomes actionable as a nuisance.").

response.") (citing *New Jersey II*, 291 U.S. at 376-77). And New Jersey has never contested that Delaware maintained a generally permissive regulatory stance through its common law prior to 1961, when its statutes first governed submerged lands.

Second, as of 1961, Delaware consistently regulated projects within the twelve-mile circle, explicitly grandfathering pre-1969 structures and asserting authority over cross-border projects. The State rejected the 1971 proposed cross-border El Paso LNG unloading facility. *See supra* p. 8. And Delaware also required subaqueous lands leases for structures extending into Delaware by DuPont (1971),[37] Keystone (1991), Fort Mott (1996), and Fenwick Commons (2005). *See supra* pp. 9-10. Indeed, New Jersey itself sought Delaware's permission for the Fort Mott structure, and in 2006 applied to renew its permit. *See supra* pp. 10, 13.

In developing its own coastal zone management plan for federal approval, New Jersey thoroughly investigated its power within the twelve-mile circle and ultimately recognized that "any New Jersey project extending beyond mean low water must obtain coastal permits from both states." DA 4177 (NJ Admissions Response No. 62). New Jersey's suggestion (at 47-48) that its coastal management plan was developed in ignorance of the Compact is untenable. New Jersey's 1979 Options Report concluded that Delaware may regulate or prohibit a proposed project extending from New Jersey into Delaware, based on its detailed boundary analysis of *New Jersey II*, *see* DA 2509, which in turn analyzed the Compact. New Jersey's draft plan recognizing Delaware's regulatory jurisdiction within

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[37] New Jersey focuses (at 47) on the DuPont project, claiming that Delaware retreated from its demand for lease payments. Delaware, however, granted a lease to DuPont and has continued to issue permits for the DuPont facility. Although DuPont disputed Delaware's regulatory authority, Delaware's agreement not to collect payments until the dispute over the outshore lands was resolved did not concede its lack of authority. *See* DA 3409-67; DA 1353-54 (Moyer Aff. ¶¶ 13-18).

the twelve-mile circle was widely distributed to New Jersey government officials, including the Attorney General, who previously had opined that the Compact gave New Jersey no territorial rights within the twelve-mile circle. *See* Rep. 81-82. Before issuing the 1979 Options Report, New Jersey had pledged in 1978 to consult with its Attorney General on boundary issues. *See supra* p. 11 & n.11. And the Compact itself has long been codified in New Jersey's statutes – so New Jersey can hardly argue ignorance of its own laws. *See* N.J. Stat. Ann. §§ 52:28-34 to 52:28-45; 1905 N.J. Laws ch. 42.[38]

New Jersey claims (at 44) that "the most important post-Compact evidence" is not that course of conduct but Delaware's statements in *New Jersey II*. Each statement that New Jersey cites, however, is consistent with Delaware's position that it has police power authority over cross-boundary projects. For example, New Jersey relies (at 44) on a statement by counsel to the Special Master in *New Jersey II* that "in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them." NJA 126a-1. But that statement is consistent with Delaware continuing to exercise its police powers over activities on wharves in Delaware territory. Immediately after

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[38] Similarly, New Jersey concedes (at 47-49) that its officials accepted Delaware's regulation of projects within the twelve-mile circle, but claims that they did not specifically refer to Article VII. New Jersey's core assertion – that its officials were ignorant of New Jersey's statutes, where the 1905 Compact is codified – is dubious. In any event, the practice of compact or treaty signatories evidences proper interpretation, separate from government officials' interpretations. *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989) (separately treating signatories' practice and the interpretation of provisions by officials charged with their enforcement); *O'Connor v. United States*, 479 U.S. 27, 33 (1986) (course of conduct is evidence of an agreement's meaning); *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273 (1877) ("The practical interpretation of an agreement by a party to it is always a consideration of great weight. . . . Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties . . . often claim more, but rarely less, than they are entitled to.").

New Jersey II was rendered, Delaware asserted the right to tax wharves extending from New Jersey, belying the suggestion (*see* NJ Br. 45) that counsel conceded *New Jersey's* exclusive jurisdiction over wharves. *See* DA 2098. In any event, New Jersey has abandoned its prescription and estoppel arguments.

New Jersey then cites (at 44) Delaware's statements that "Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water."[39] None of those statements, however, refers to *New Jersey's* authority to exercise riparian jurisdiction, much less suggests that such authority would be "exclusive" of Delaware's police powers. Rather, Delaware recognized that private riparian owners may wharf out, not who had authority to regulate those rights. In context, Delaware acknowledged that a private owner's right to wharf out was not adverse to the State's ownership of the subaqueous soil. *See, e.g.*, DA 2213-14; *see also* DE SJ Opp. 46-54.

BP argues (at 22-23) that the Master "overlooked a critical episode"[1] in which the Delaware State Highway Department allegedly conceded that New Jersey alone had jurisdiction over cross-border riparian structures. *First*, the letter BP cites was written by the Department's outside counsel (who merely concurred in an opinion rendered by counsel for a private party, DuPont) and does not bind Delaware or its agencies. *Second*, the Department did not adopt that interpretation of the 1905 Compact or suggest that Delaware lacked authority to regulate such projects. Instead, the Department took "cognizance of"

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[39] Despite abandoning its unsuccessful judicial estoppel argument, New Jersey maintains (at 45) that Delaware's representations in *New Jersey II* "played a[n] important role" in the Court's determination of title. But the Master did not read Delaware's statements to concede any authority to New Jersey to regulate riparian rights in Delaware. *See* Rep. 88-91. This Court had found that the 1905 Compact did not go beyond providing "for the enjoyment of riparian rights," 291 U.S. at 377-78, and did not address the scope of riparian rights or the authority to regulate them. *See also* DE SJ Br. 35-45; DE SJ Opp. 21-35.

the lawyer's opinion and stated that it would advise the Army Corps of Engineers that the "Department has no jurisdiction over the area mentioned." NJ Reopen App. 109a-110a. Delaware's 1961 legislation regulating submerged lands superseded the private counsel's earlier incorrect view of Delaware's authority. *See supra* p. 8.[40]

The course of performance thus confirms the 1905 Compact's text: Delaware may exercise its police powers to regulate riparian improvements in its territory.

CONCLUSION

The Court should overrule New Jersey's exceptions and enter the Special Master's proposed decree.

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[40] BP argues (at 24-28) that the Master should have considered and rejected the parties' recent course of performance as evidence of prescription. But Delaware never argued that New Jersey lost any compact rights through prescription. *See* Rep. 92 n.170.

Respectfully submitted,

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